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TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 274

HERBERT H. MAASS, AS SOLE SURVIVING EXECUTOR OF THE LAST WILL AND TESTAMENT OF IDA H. SAKS, DECEASED, PETITIONER,

vs.

JOSEPH T. HIGGINS, COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED JULY 23, 1940.

CERTIORARI GRANTED OCTOBER 14, 1940.

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United States Circuit Court of Appeals

FOR THE SECOND CIRCUIT

JOSEPH I. SAKS and HERBERT H. MAASS, as Executors of the Last Will and Testament of Ida H. Saks, deceased,
Plaintiffs-Appellants,

—against—

JOSEPH T. HIGGINS, Collector of Internal Revenue for the Third District of New York,
Defendant-Appellee.

Statement Under Rule XIII.

This action was commenced by the service of the summons and complaint on or about the 19th day of May, 1939. Thereafter, the parties hereto, by their respective attorneys, entered into a stipulation dated the 14th day of July, 1939, amending the complaint in respect of certain clerical matters. Issue was joined by the service of the defendant's answer on or about the 16th day of September, 1939, and the subsequent filing thereof in the office of the Clerk of the Court.

This is an appeal from a judgment entered in the office of the Clerk of the United States District Court for the Southern District on the 9th day of November, 1939, in favor of the defendant and against the plaintiff, dismissing the plaintiffs' complaint and awarding judgment to the defendant in the sum of $20.00 costs. Said judgment was entered pursuant to the decision and opinion of the Honorable Henry W. Goddard dated the 27th day of October,

1939, and duly filed in the office of the Clerk of said District Court.

No trial was had, the said judgment having been rendered upon the cross motion of the defendant for judgment on the pleadings, consisting of the complaint, answer and stipulation aforesaid.

This appeal was taken by the filing of the notice of appeal in the office of the Clerk of the said District Court on the 10th day of November, 1939.

There has been no change in the names of the parties to this action as they are stated above.

The plaintiffs were represented by Maass & Davidson, their attorneys, and the defendant by John T. Cahill, United States Attorney for the Southern District of New York, and there has been no change of attorneys since the commencement of this action.

Summons.

DISTRICT COURT OF THE UNITED STATES,

FOR THE SOUTHERN DISTRICT OF NEW YORK.

Civil Action.

File Number: Civ. 3-484.

JOSEPH I. SAKS and HERBERT H. MAASS, as Executors of the Last Will and Testament of Ida H. Saks, deceased,

Plaintiffs,

—against—

JOSEPH T. HIGGINS, Collector of Internal Revenue for the Third District of New York,

Defendant.

To the above-named Defendant:

You are hereby summoned and required to serve upon Maass & Davidson, plaintiffs' attorneys, whose address is 20 Exchange Place, New York City, an answer to the complaint which is herewith served upon you, within sixty days after service of this summons upon you, exclusive of the day of service. If you fail to do so, judgment by default will be taken against you for the relief demanded in the complaint.

CHARLES WEISER,
Clerk of the Court.

(Seal of the U. S. District Court)

Dated May 16, 1939.

Complaint.

10

[SAME TITLE.]

Plaintiffs, by Maass & Davidson, their attorneys, for their complaint herein, allege:

1. That on or about the 30th day of August, 1936, Ida H. Saks, who was then a resident of the Borough of Manhattan, City, County and State of New York, died leaving a Last Will and Testament which was thereafter
11 duly admitted to probate in the Surrogate's Court of the County and State of New York, and that letters testamentary were issued thereupon to the plaintiffs, who ever since then have been and still are the duly qualified and acting executors thereof.

2. That at all the times hereinafter mentioned the plaintiffs were and now are citizens of the United States and of the State of New York. That the plaintiff Joseph I. Saks resides at No. 14 West 86th Street, in the Borough of Manhattan, City, County and State of New York, and the plaintiff Herbert H. Maass resides at No. 888 Park Avenue, in the Borough of Manhattan, City, County and
12 State of New York.

3. On information and belief, that at all of the times hereinafter mentioned the defendant was and still is the duly appointed Collector of Internal Revenue for the Third District of New York, which is the district within which plaintiffs reside as aforesaid.

4. This is a suit of a civil nature arising under the Internal Revenue Laws of the United States.

5. That in pursuance of the laws and statutes of the United States the plaintiffs duly filed their return for Federal estate tax upon the estate of said decedent, and in such return exercised the option granted to them by the provisions of Section 302 of the Revenue Act of 1926, as amended by Section 404 of the Revenue Act of 1934 and Section 202 (a) of the Revenue Act of 1935, to have the value of all the property included therein on the date of the decedent's death determined as of the optional valuation date as therein provided. 13

6. That thereupon and pursuant to the provisions of Article 11 of Regulations 80, which were adopted by the Commissioner of Internal Revenue and which purport to interpret the laws and statutes pertaining to the assessment of Federal estate taxes, the Commissioner of Internal Revenue included in the amount of the decedent's estate determined to be taxable herein, the sum of $12,801.91, which said sum was not in fact property of the decedent belonging to her at the time of her death, but on the contrary represented income, to wit, rents, dividends and interest earned by and upon the property and assets of the estate subsequent to the date of death of said decedent. 14

7. That accordingly, having included the said sum of $12,801.91, as aforesaid, among the assets and property of the estate, the Commissioner of Internal Revenue determined that the amount of the gross estate was $791,063.42; the allowable deductions were $90,591.97; the net taxable estate was $700,471.45; and that the proper amount of said estate tax to be assessed against the said estate should be and was the sum of $63,666.49, and he thereupon duly assessed the said amount as the amount of Federal estate taxes payable by the said estate. 15

8. The plaintiffs paid to the defendant the sum of $58,304.44 on account of said tax on the 30th day of No-

16 vember, 1937, and the balance of $5,362.05, plus interest of $303.72 thereon, on the 28th day of November, 1938.

9. Upon information and belief, that the said Article 11 of Regulations 80 promulgated by the Commissioner of Internal Revenue, as aforesaid, was invalid and null and void in that the same was not and is not authorized or permitted by the provisions of law which it purports to interpret.

10. Upon information and belief, that the acts of the Commissioner of Internal Revenue in including in the taxable estate herein the aforesaid sum of $12,801.91 repre-
17 senting rents, dividends and interest earned by the property and assets of the estate subsequent to the date of death of the decedent were improper and not in pursuance of law.

11. That if the said sum of $12,801.91 had not been included in the amount of taxable estate the proper and correct amount of Federal estate tax payable by the said estate would have been only the sum of $59,931.88.

12. That on or about the 10th day of April, 1939, the plaintiffs duly filed their claim for refund, based upon the foregoing facts, in the said sum of $3,734.61 and interest,
18 a true copy of which said claim for refund is hereto annexed marked "Exhibit A".

13. That on the 3rd day of May, 1939, the Commissioner of Internal Revenue rejected the said claim for refund in its entirety, a true copy of the letter of rejection being hereto annexed and marked "Exhibit B", and neither the said amount of $3,734.61 and interest, nor any part thereof, has been refunded or repaid to the plaintiffs.

14. Upon information and belief, that by reason of the

premises the defendant has had and received money of the plaintiffs, has become indebted to the plaintiffs in the said sum of $3,734.61 plus $217.84 representing interest thereon to date of overpayment, aggregating $3,952.45, together with interest thereon from the 28th day of November, 1938, being the date of overpayment as aforesaid, as provided by law.

WHEREFORE, plaintiffs demand judgment against the defendant for the sum of $3,952.45, with interest thereon from the 28th day of November, 1938 as provided by law, together with the costs and disbursements of this action.

MAASS & DAVIDSON,
Attorneys for Plaintiffs,
Office and P. O. Address,
No. 20 Exchange Place,
Borough of Manhattan,
City of New York.

(Verified by Joseph I. Saks, one of the plaintiffs, on May 16, 1939.)

EXHIBIT A, ANNEXED TO COMPLAINT.

22

FORM 843
TREASURY DEPARTMENT
INTERNAL REVENUE SERVICE
Revised June 1930

CLAIM

TO BE FILED WITH THE COLLECTOR WHERE ASSESSMENT WAS MADE OR TAX PAID

The Collector will indicate in the block below the kind of claim filed, and fill in the certificate on the reverse side.

23

REFUND OF TAX ILLEGALLY COLLECTED.

REFUND OF AMOUNT PAID FOR STAMPS UNUSED, OR USED IN ERROR OR EXCESS.

ABATEMENT OF TAX ASSESSED (not applicable to estate or income taxes).

State of New York,
County of New York—ss.:

Name of taxpayer or purchaser of stamps Estate of Ida H. Saks, Deceased. Joseph I. Saks and Herbert
24 H. Maass, Executors.

Business address c/o Maass & Davidson, 20 Exchange Place, New York, N. Y.

Residence As above.

The deponent, being duly sworn according to law, deposes and says that this statement is made on behalf of the taxpayer named, and that the facts given below are true and complete:

1. District in which return (if any) was filed Third District, New York.

Exhibit A, Annexed to Complaint.

2. Period (if for income tax, make separate form for each taxable year) from , 19 , to , 19 . 25

3. Character of assessment or tax Federal estate tax.

4. Amount of assessment, $73,358.59; dates of payment 11/30/37—$58,304.44; 11/28/38—$5,362.05 and interest; balance of tax credited.

5. Date stamps were purchased from the Government

6. Amount to be refunded $3,734.61.

7. Amount to be abated (not applicable to income or estate taxes) $ 26

8. The time within which this claim may be legally filed expires, under Section 319(b) of the Revenue Act of 1926, on November 30, 1940.

The deponent verily believes that this claim should be allowed for the following reasons:

The gross estate determined herein was $791,063.42 and the allowable deductions, exclusive of specific exemption and exemptions for property taxed, were determined at $90,591.97. The estate elected to have the property constituting the gross estate valued at the optional valuation date, in accordance with Section 202(a) of the Revenue Act of 1935. Accordingly, the estate, in compliance with the provisions of Article 11, Regulations 80, but under protest, included, together with each item of the gross estate, the amount of income collected or otherwise accrued or realized upon the same between the date of death and the valuation date. Such items of income amounted to $12,801.91 with respect to the items of gross estate listed in Schedule B of the return herein, the further sum of $6,321.08 with respect to Item 33 of 27

Exhibit A, Annexed to Complaint.

Schedule I of the return, and the further sum of $833.33 with respect to Item 34 of said Schedule I. If, as the estate contends should have been done, all of said items of income had been excluded from the gross estate, the amount thereof would have been determined at $771,107.10, the deductions at $90,591.97 as before, the deduction on account of property previously taxed for the purposes of the computation under the Revenue Act of 1926 at $208,367.77, and the deduction on account of property previously taxed for the purpose of the computation under the Revenue Act of 1932 as amended at $229,903.87.

The foregoing revisions of computation would result in a reduced tax of $69,040.59, against which there would be allowable credit for taxes paid to the State of New York of $9,108.71, leaving the sum of $59,931.88 as the amount of tax payable herein after credit for taxes paid to the State of New York. The amount of tax heretofore paid herein is $63,666.49, thus resulting in an overpayment of $3,734.61, which is the amount of the refund hereby sought.

The estate submits that the items of income hereinbefore referred to constituted no part of the gross taxable estate, and that the provisions of Article 11, Regulations 80, are unauthorized, illegal and invalid.

The rights of the estate with respect to these items were fully reserved in the proceedings resulting in the determination of the tax heretofore assessed herein.

The return in connection with which this claim for refund is made was filed by Joseph I. Saks and Herbert H. Maass, Executors, who are still acting as such.

Signed ESTATE OF IDA H. SAKS, Deceased,
By HERBERT H. MAASS,
Executor.

(Sworn to and subscribed April 6, 1939.)

EXHIBIT B, ANNEXED TO COMPLAINT.

TREASURY DEPARTMENT

Washington

May 3 1939

Office of
Commissioner of Internal Revenue
Address Reply to
Commissioner of Internal Revenue
And Refer to
MT-ET-C1-8464-3d New York
Estate of Ida H. Saks
Date of death—September 30, 1936
Herbert H. Maass, et al., Executors,
c/o Maass & Davidson,
20 Exchange Place,
New York, New York.

Gentlemen:

The Bureau has examined the claim filed by you on April 10, 1939, on behalf of the above-named estate for refund of $3,734.61, Federal estate tax paid under the provisions of the Revenue Acts of 1926 and 1935.

In this case the executors elected to have the property included in the gross estate of this decedent valued in accordance with the method authorized by subdivision (j) of section 302 of the Revenue Act of 1926, as added by section 202 of the Revenue Act of 1935. In the audit by the Bureau the values were determined in accordance with the above section and article 11 of Regulations 80, and dividends and interest that had accrued to the optional valuation dates were included in the gross estate.

The estate contends that accrued income, dividends and interest to the valuation dates should not have been included in the gross estate, that they constituted no part of the decedent's gross estate, and that the provisions of

34 article 11 of Regulations 80 are unauthorized, illegal and invalid.

The inclusion of dividends and interest that had accrued to the optional valuation dates is in accordance with article 11 (last paragraph beginning on page 38 of Regulations 80, 1937 Edition) which represents the Bureau's construction of the statute above referred to.

In view of the above and since there appears to be no overassessment of tax in this case, the claim for refund is rejected in its entirety.

Respectfully,

35 GUY T. HELVERING,
Commissioner.
By: D. S. BLISS

D. S. BLISS,
Deputy Commissioner.

Stipulation as to Complaint.

36 [SAME TITLE.]

IT IS HEREBY STIPULATED AND AGREED, by and between the attorneys for the plaintiffs and John T. Cahill, Esq., United States Attorney, attorney for the defendant, that the complaint herein be, and the same hereby is, amended in the following respects:

In paragraphs 6, 7, 10 and 11, wherever there appears the figure "$12,801.91" the same shall be deemed amended to read as though it were "$19,956.32".

IT IS HEREBY FURTHER STIPULATED AND AGREED, that an order to the foregoing effect may, if necessary, be entered without notice. 37

Dated, New York, July 14, 1939.

MAASS & DAVIDSON,
Attorneys for Plaintiffs.

JOHN T. CAHILL,
United States Attorney,
Attorney for Defendant.

38

Answer.

[SAME TITLE.]

Joseph T. Higgins, Collector of Internal Revenue for the Third District of New York, defendant, by John T. Cahill, United States Attorney for the Southern District of New York, for his answer to the complaint of the above-named plaintiff:

39

1. Admits the allegations contained in paragraph numbered "7" of the complaint, except to allege that deductions, including the specific exemptions allowed under the Revenue Act of 1926, were allowed in the sum of $400,685.39, resulting in a net estate of $390,378.03 for tax imposed by the Revenue Act of 1926; deductions, including the specific exemption allowed under the Revenue Act of 1935, were allowed in the sum of $361,678.24, resulting in a net estate of $429,385.18 for tax imposed by the Revenue Act of 1935, and resulting in a total net tax of $73,358.59,

40 against which a credit was allowed in the amount of $9,692.10.

2. Denies each and every allegation contained in paragraphs numbered "9" and "14" of the complaint.

3. Denies each and every allegation contained in paragraph numbered "10" of the complaint, and alleges affirmatively that the sum of $19,956.32 representing rents, dividends and interest earned by the property and assets of the estate subsequent to the death of the decedent, were properly includible in the gross estate, in pursuance of the statute and the regulations pertaining thereto.

41

WHEREFORE, defendant prays that judgment be entered dismissing the complaint on the merits, and awarding the costs and disbursements of this action to the defendant.

Dated: New York, N. Y., September 16, 1939.

JOHN T. CAHILL,
United States Attorney for the
Southern District of New York,
By: DAVID MCKIBBIN, 3RD,
Assistant United States Attorney,
Attorney for the Defendant,
Office & Post Office Address,
United States Court House, Foley Square,
Borough of Manhattan,
City of New York.

42

(Unverified.)

Plaintiffs' Notice of Motion.

[SAME TITLE.]

Sir:

PLEASE TAKE NOTICE that upon the pleadings herein, consisting of the complaint, the stipulation entered into between the attorneys for the respective parties hereto dated the 14th day of July, 1939 amending said complaint, and the answer of the defendant, copies of each of which are hereto annexed, the plaintiffs will move this Court, at a term thereof for the hearing of motions, to be held at the United States Court House, Foley Square, in the Borough of Manhattan, City of New York, on the 3rd day of October, 1939, at 10:30 o'clock A. M. of that day, or as soon thereafter as counsel can be heard, for judgment on the pleadings in favor of the plaintiffs and against the defendant, for the relief demanded in the complaint, and for such other and further relief as to the Court may seem just and proper.

Dated, New York, N. Y., September 19, 1939.

Yours, etc.,

MAASS & DAVIDSON,
Attorneys for Plaintiffs,
Office and P. O. Address,
20 Exchange Place,
Borough of Manhattan,
New York, N. Y.

To:
JOHN T. CAHILL, ESQ.,
United States Attorney,
Attorney for Defendant,
United States Court House,
Office and P. O. Address,
Foley Square,
Borough of Manhattan,
New York, N. Y.

Defendant's Notice of Cross-Motion.

46

[SAME TITLE.]

Sirs:

PLEASE TAKE NOTICE that upon the pleadings herein, consisting of the complaint, the stipulation entered into between the attorneys for the respective parties hereto, dated the 14th day of July, 1939, amending said complaint, and the answer of the defendant, the defendant will move this Court at a term thereof for the hearing of motions to be held at the United States Court House, Foley Square, Borough of Manhattan, City of New York, on the
47 3rd day of October, 1939, at 10:30 o'clock A. M. of that day or as soon thereafter as counsel can be heard for a judgment on the pleadings in favor of the defendant and against the plaintiffs for the relief demanded in the answer and for such other and further relief as to the Court may seem equitable and just.

Dated, New York, N. Y., September 25, 1939.

Yours, etc.,

JOHN T. CAHILL,
United States Attorney for the
Southern District of New York,
Attorney for Defendant,
48 Office & P. O. Address,
United States Court House,
Foley Square,
Borough of Manhattan,
City of New York.

To:

MAASS & DAVIDSON, ESQS.,
Attorneys for Plaintiffs,
20 Exchange Place,
Borough of Manhattan,
New York, N. Y.

Opinion of Goddard, *D. J.*

49

[SAME TITLE.]

MAASS & DAVIDSON, Attorneys for Plaintiffs, by David J. Levy, of Counsel.

JOHN T. CAHILL, United States Attorney; by David McKibbin, 3rd, Assistant U. S. Attorney, of Counsel.

GODDARD, District Judge:

50

The case came on for hearing on motion of plaintiffs for judgment on the pleadings and the cross motion by the defendant for judgment in his favor. There is no dispute as to the facts and the sole issue of law presented is the validity of Article 11, Regulations 80 which was adopted by the Commissioner of Internal Revenue as an interpretation of Section 202a of the Revenue Act of 1935 (28 U. S. C. A. 411j). The entire case turns upon the point as to whether or not the regulation is in harmony with the Statute and is a reasonable exercise of the Commissioner's power to make rules and regulations for the enforcement of the Revenue Act. See Section 1101 of the Revenue Act of 1926 (26 U. S. C. A. 1691).

51

The pleadings show that plaintiffs are the duly appointed Executors of the Last Will and Testament of Ida H. Saks who died on August 30, 1936, a resident of New York City. As such Executors, they filed a Federal Estate Tax Return in which they elected, in accordance with Section 202a of the Revenue Act of 1935, to have the property of the estate valued for the purposes of the estate tax as of the "optional valuation date" rather than as of the date of the decedent's death. Section 202a of the Revenue Act of 1935 amends

52 Section 302 of the Revenue Act of 1926 so as to provide for such an election in the following manner:

> "If the executor so elects upon his return * * * the value of the gross estate shall be determined by valuing all the property included therein on the date of decedent's death as of the date one year after decedent's death, except that (I) property included in the gross estate on the date of death and, within one year after the decedent's death, distributed by the executor * * * or sold, exchanged or otherwise disposed of, shall be included at its value as of the time of such distribution, sale, exchange or other disposition, whichever first occurs, instead of its value as of the date one year after the decedent's death * * *."

53

The obvious purpose of the section was to afford estates some relief from the hardships that might be imposed upon them if the estate tax had to be computed exclusively upon the basis of values existing on the date of the decedent's death. The Committee's reports show that Congress had in mind the situation faced by an executor who took office in a time of rapidly falling markets. In such situations, some executors found that their estates soon had
54 diminished to an amount barely sufficient to pay an estate tax based upon values which had existed only at the time of their decedent's death. This possible hardship the section sought to alleviate.

In this action the executors seek to recover from the Collector the amount which they paid under protest as estate tax upon the income received by the estate during the interim between the date of their decedent's death and the optional valuation date. Article 11, Regulations 80, requires such income to be included in the return. The theory underlying Article 11, Regulations 80, is that "all

the property included (in the gross estate) on the date of death * * *" must be interpreted as having a dual nature. Article 11, Regulations 80, relating to the Federal Estate Tax is lengthy but the pertinent part of it provides: 55

> "The property to be valued as of one year after the date of decedent's death, or as of date of decedent's death, or as of some intermediate date, is the property included in the gross estate on the date of the decedent's death. As property and its value are separate and distinct, the former denoting legal rights, the latter the monetary measure of such rights, and as subdivision (j) treats of the two separately, it will be necessary in every case first to determine what property constituted the gross estate at decedent's death." * * * 56
>
> "Interest-bearing obligations, such as bonds and notes, embody two promises, one to pay principal and the other to pay interest, and both promises are a part of the gross estate at the death of the decedent, if the obligation was then owned by him, or had been previously so transferred by him, or at his death there was vested in him any such right or power in or with respect to the obligation as to bring it within any of the other subdivisions of section 302, as amended. If the valuation date is that of decedent's death the principal of the obligation and interest then accrued and unpaid thereon are to be valued as of that date. If the valuation date is subsequent to death, the principal and interest then accrued and unpaid are to be valued as of that date. The valuation date of any part payment of principal or of any installment of interest, made between decedent's death and the date as at which the obligation is to be valued, will be the date of such payment. Like rules will govern, so far as 57

58 applicable, when any other obligation is involved, as, for example, one calling for the payment of rent or a royalty. Thus, in the case of rent, if the realty and the obligation to pay the rent reserved were parts of the gross estate at the time of decedent's death, the value of the former must be determined as of the applicable valuation date, and also the value of the rent then accrued and unpaid reserved by the latter. The valuation date of any rent paid in the interim pursuant to the rental obligation will be the date of its payment."

* * * * * * * * *

59 "When corporate stock is a part of the gross estate at decedent's death, and a dividend in partial liquidation is thereafter paid on or before the date as of which the stock is to be valued, the valuation date of such dividend will be the date of its payment. Similarly, a dividend paid within the same period out of earnings, whether made or accumulated prior or subsequent to decedent's death, will be valued as of the date of its payment. Earnings of the corporation neither declared as a dividend nor paid between decedent's death and the valuation date of the stock, will be reflected in the value of the stock. But a dividend declared prior to the
60 valuation date of the stock but payable subsequent thereto will not be so reflected if 'ex dividend' on valuation date of the stock, but is to be valued as of that date."

Plaintiffs argue that the option granted to estates by Section 202a of the Revenue Act of 1935 did not change the concept of "Gross Estate", and does not require that income earned and collected after the date of death shall be included therein. It is said that so far as Article 11, Regulations 80, attempts to tax such income it is unau-

thorized and void as an attempt to extend a law which 61
it purports to interpret.

At the outset it should be stated that although it is true that where an Act uses ambiguous terms or is of doubtful construction, a clarifying regulation or one indicating the method of an Act's application to specific cases is to be given weight by the courts, the interpretation of a statute always remains the function of the judiciary. The regulation cannot change what the Act originally meant. See *Manhattan General Equipment Co.* v. *Commissioner of Internal Revenue,* 297 U. S. 129; *Koshland* v. *Helvering,* 298 U. S. 441. Clearly, Article 11, Regulations 80, is an interpretative regulation and does 62
not lay down merely an administrative rule with respect to a matter of tax procedure. As such it can only be sustained if the Commissioner has interpreted the statute in a reasonable fashion.

In my judgment, the Commissioner has interpreted the statute in a reasonable manner and defendant's motion for a summary judgment should be granted. First, I think that it is reasonable to interpret the phrase "all the property included (in the gross estate) on the date of the decedent's death" as meaning all the principal and income rights included in the estate on the date of death. Certainly, even in the case in which the return is made on the basis of values as of the date of death and there is 63
no election, the valuation then made necessarily has to take into account both principal rights and income rights. Thus a bond must be returned at the price at which it was quoted upon the open market, plus all income accrued to date of death, even though the decedent would not have received that particular accrual unless he survived the payment date. This indicates that the "property" referred to in the Estate Tax Law has a dual nature and in view of the interests into which property is often divided, such

64 as life estates and remainders, no new theory is involved in this construction of the term.

Secondly, it is reasonable to measure the revaluation of the income rights included in the estate at the date of death by what was actually received as income during the option period. It must be remembered that the election does not have to be made until after the year has expired and so, at the time when it is made, the income actually earned during the year is a counterpart of what should be taken into consideration in appraising at the date of death the probable increase in the value of the income rights which were then included in the estate. Similarly, in the case of principal gains the amount actually realized
65 during the period is the measure for the purposes of revaluation. It may be noted that plaintiffs' argument to the effect that income earned after death cannot be considered to be a part of the property which is to be revalued, because it is not present in the estate at the time of death, is equally applicable to capital gains made by the estate after death. Like the income received during the year, these gains would not be taxed if the return was made upon the basis of date of death values. At the time of the decedent's death they, like the income, were only "property" included in the estate insofar as they were directly attributable to the principal rights which were
66 part of that property. Yet plaintiffs admit that such gains are taxable if the election is made.

Thirdly, as interpreted by the Commissioner, the statute is in harmony with the theory that the Estate Tax is an excise tax upon the power to pass property and is measured by what the decedent has at his disposal at the moment of his death. *New York Trust Co.* v. *Eisner,* 256 U. S. 345; *Schuette* v. *Bowers,* 40 Fed. (2nd) 208. In effect, what the statute says is that an executor may assume, if he so desires, that his decedent died a year later

than he actually did and the estate tax will then be levied as if the event upon which it is dependent had also happened at the later date. Thus to be consistent, everything that is found in the estate at the end of the year after death should be taxed even though part of what is then in the estate originally may have been income. 67

It has also been argued that the Commissioner's interpretation of the statute results in a taxation of the income received during the option period by both the Income and the Estate Tax Laws and that the court should, if possible, avoid an interpretation which results in a double taxation. See *Bull* v. *United States*, 295 U. S. 247; *United States* v. *Supplee-Biddle Hardware Co.*, 265 U. S. 189. But this rule is not applicable to the case at bar. First, whatever double taxation there is, it results primarily from an election made by the executor. Secondly, even if the statute were interpreted so as to exclude income earned during the option period from the estate tax, the statute would still result in a double taxation. The capital gains made during the year would be both income and part of the gross estate. Thirdly, there is such a double taxation even where there is no election. For example, if right after a death it is found that a decedent's bank account contains a large sum of cash that he has but recently received from his various securities and for which his executors must satisfy his income tax liability, this sum is also included in his estate and is subject to the estate tax along with everything else that belongs to him at the moment that he dies. 68 69

In view of the fact that there has been no reported litigation with respect to Article 11, Regulations 80, I do not think that Congressional re-enactment of the Estate Tax Law, including Section 202a of the Revenue Act of 1935, can be characterized as an indication of that body's approval of the regulation adopted by the Commissioner with respect to the section. But for the reasons which I have

70 set forth, it is my opinion that the regulation is a reasonable interpretation of the statute and defendant's motion is therefore granted.

October 27, 1939.

HENRY W. GODDARD,
U. S. D. J.

Order Appealed From.

At a Stated Term of the United States District Court, held in and for the Southern District of
71 New York, at the United States Court House, Foley Square, Borough of Manhattan, City of New York, on the 2nd day of November, 1939.

Present—HONORABLE HENRY W. GODDARD,
United States District Judge.

[SAME TITLE.]

The motion for judgment on the pleadings made by the plaintiffs herein in the above entitled action, and the cross motion for judgment on the pleadings made by the defend-
72 ant herein, having come on to be heard before this Court on the 10th day of October, 1939, and after hearing Maass & Davidson, attorneys for the plaintiffs, by David J. Levy, of Counsel, and John T. Cahill, United States Attorney for the Southern District of New York, attorney for the defendant, by David McKibbin, Assistant United States Attorney, of Counsel, in support of the respective motions, and due deliberation having been had, and an opinion dated October 27, 1939 having been filed,

Now, on motion of John T. Cahill, United States Attorney for the Southern District of New York, it is

ORDERED, that the defendant's motion for judgment on 73
the pleadings be and the same hereby is granted and the plaintiffs' motion for judgment on the pleadings be and the same hereby is denied; and it is

FURTHER ORDERED, that the complaint be and the same hereby is dismissed upon the merits, and that the costs and disbursements of this action be awarded to the defendant, and that the defendant have judgment and execution therefor.

HENRY W. GODDARD,
U. S. D. J.

74

Judgment Appealed From.

[SAME TITLE.]

An order having been entered on the 3d day of November, 1939, granting the defendant's motion for judgment on the pleadings and denying the plaintiffs' motion for judgment on the pleadings, and directing that judgment be entered in favor of the defendant herein,

75

NOW, on motion of John T. Cahill, United States Attorney for the Southern District of New York, attorney for the defendant, it is

ORDERED AND ADJUDGED that judgment on the pleadings is hereby rendered in favor of the defendant, that the complaint herein be and is hereby dismissed upon the merits and that Joseph T. Higgins, Collector of Internal Revenue for the Third District of New York, defendant herein, recover of the plaintiffs, Joseph I. Saks, 14 West 86th Street, New York, N. Y. and Herbert H. Maass, 888

76 Park Avenue, New York, N. Y., as executors of the last will and testament of Ida H. Saks, deceased, the costs and disbursements of this action as taxed in the sum of $20 and that the defendant have execution therefor.

Dated: New York, N. Y., November 9th, 1939.

GEORGE J. H. FOLLMER,
Clerk.

NOTICE OF SETTLEMENT of the within judgment is hereby waived.

MAASS & DAVIDSON,
77 Attorneys for Plaintiffs.

Notice of Appeal.

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

Civ. 3-484.

JOSEPH I. SAKS and HERBERT H. MAASS, as Executors of the Last Will and Testament of Ida H. Saks, Deceased,
78 Plaintiffs,

—against—

JOSEPH T. HIGGINS, Collector of Internal Revenue for the Third District of New York,
Defendant.

Sirs:

PLEASE TAKE NOTICE that Joseph I. Saks and Herbert H. Maass, as Executors of the Last Will and Testament

of Ida H. Saks, deceased, the above-named plaintiffs, hereby 79
appeal to the Circuit Court of Appeals for the Second Circuit from the final judgment which was entered in this action by the United States District Court for the Southern District of New York on the 9th day of November, 1939, in favor of the defendant and against the plaintiffs herein, and from each and every part of said judgment.

Dated, New York, N. Y., November 10, 1939.

Yours, etc.,

MAASS & DAVIDSON,
Attorneys for Plaintiffs, 80
Office and P. O. Address,
No. 20 Exchange Place,
Borough of Manhattan,
City of New York.

To:
JOHN T. CAHILL, ESQ.,
United States Attorney,
Attorney for Defendant,
U. S. Court House,
Foley Square,
Borough of Manhattan,
City of New York. 81

CLERK OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

Stipulation as to Record.

82

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOSEPH I. SAKS and HERBERT H. MAASS, as Executors of the Last Will and Testament of Ida H. Saks, deceased,
Plaintiffs-Appellants,

—against—

JOSEPH T. HIGGINS, Collector of Internal Revenue for the Third District of New York,
83 Defendant-Appellee.

IT IS HEREBY STIPULATED, CONSENTED TO AND AGREED by and between the attorneys for the respective parties to this appeal that the foregoing is a true copy of the transcript of the record of the said District Court in the above-entitled matter.

Dated, New York, N. Y., November , 1939.

MAASS & DAVIDSON,
Attorneys for Plaintiffs-Appellants.
84

JOHN T. CAHILL,
United States Attorney, Attorney for Defendant-Appellee.

Clerk's Certificate.

85

UNITED STATES DISTRICT COURT,

SOUTHERN DISTRICT OF NEW YORK.

JOSEPH I. SAKS and HERBERT H. MAASS, as Executors of the Last Will and Testament of Ida H. Saks, deceased,
Plaintiffs-Appellants,

—against—

JOSEPH T. HIGGINS, Collector of Internal Revenue for the Third District of New York,
Defendant-Appellee. 86

United States of America,
Southern District of New York—ss.:

I, GEORGE J. H. FOLLMER, Clerk of the District Court of the United States of America for the Southern District of New York, do hereby certify that the foregoing is a correct transcript of the record of the said District Court in the above-entitled action, as agreed upon by the parties.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed at the City of New York 87
in the Southern District, this day of November, in the year of our Lord one thousand nine hundred and thirty-nine, and of the Independence of the United States the one hundred and sixty-fourth.

GEORGE J. H. FOLLMER,
Clerk.

(Seal)

Opinions, Circuit Court of Appeals.

91

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

No. 283—October Term, 1939.

(Argued March 14, 1940 Decided April 8, 1940.)

JOSEPH I. SAKS and HERBERT H. MAASS, as executors of Ida H. Saks, deceased,

Appellants,

92

—against—

JOSEPH T. HIGGINS, Collector,

Appellee.

Appeal by the Plaintiffs from a Judgment upon the Pleadings of the District Court for the Southern District of New York, in an Action to Recover for Estate Taxes Unlawfully Collected.

93

Before—L. HAND, CHASE and CLARK, *Circuit Judges.*

HERBERT H. MAASS for the appellants.

DAVID MCKIBBEN, III, for the appellee.

ROLLIN BROWNE,

JAMES D. OUCHTERLONEY and

GEORGE CRAVEN, *amici curiae.*

94 L. HAND, *C. J.*:

The only question involved in this appeal is the validity of Article 11 of Treasury Regulations 80, implementing §202 (a) of the Revenue Act of 1935. The plaintiffs are executors, and in accordance with the privilege granted by §202 (a), they chose to value their testatrix's estate as of August 30, 1937, the first anniversary of her death. The case comes to us upon a judgment dismissing the complaint for insufficiency, which described the property erroneously taxed, merely as an income of "rents, dividends and interest", received by them within the year following their testatrix's death. The Commissioner added
95 this income to the gross estate and assessed the plaintiffs accordingly; they paid the whole tax, and are now suing to recover so much as was levied upon the addition. The question is whether the regulation was valid in treating income, subsequently received, as part of "the property included" in the gross estate "on the date of the decedent's death."

The answer is not necessarily the same for all kinds of income. For example, an interest bearing bond is a series of promises to pay installments of money in the future. Part of these we call interest because we are accustomed to regard them as consideration for the obligee's forbearance; the rest we call principal because they restore the
96 original sum advanced. They are separate obligations—so far separate, indeed, that the obligee may bring successive actions upon them—but for convenience we group them together as a single piece or property, and they pass from hand to hand as such. The value of the bond is the aggregate value of all, each promise being discounted for the interval before its performance is due as well as for any doubts of the obligor's responsibility; and it follows that if the holder of such a bond dies, and some of the promises fall due within a year, the aggregate will be

pro tanto the smaller. If we appraise them then, we 97
shall be appraising less "property" than the holder possessed at death. This would at once be admitted as to part payments of principal, and interest is no different. It is payable, regardless of what the loan may have earned for the borrower; and although to the lender the payments may appear to be the produce of his principal, it is not so; he gets it not because anything comes out of the money lent, but merely because a future dollar payable by another is less desirable than a present dollar in hand. His right to interest dates from the beginning. Similarly, in the case of any other series of promises, like a lease, the performance of any one or more of them actually changes the 98
original property, even though we continue to speak of the whole series as though it were the same. Indeed, since the series does not include any promise to repay principal, a lease is ever more plainly a wasting piece of property. For these reasons we think that as to all transactions of this kind it was permissible to read the word, "property", in §202 (a) distributively; that is, as referring to an aggregate of obligations which changes with time. When a statute is open to fair differences of construction an administrative interpretation is often highly persuasive. *Koshland* v. *Helvering*, 298 U. S. 441, 446; *Armstrong Co.* v. *Nu-Enamel Corp.*, 305 U. S. 315, 329, 330, 331; *Bowen* v. *Johnston*, 306 U. S. 19, 29, 30; *Lynch* v. *Tilden* 99
Co., 265 U. S. 315, 322, 331; *U. S.* v. *Johnston*, 124 U. S. 236, 253.

The case is, however, otherwise as to dividends. Strictly we should not speak of these as separable from their shares until, by being declared, they become a debt of the company. For this reason, although what we have just said about interest applies truly enough to dividends already declared at the time of the decedent's death, a strong argument can be made for holding that as to others the regulation exceeded the statute. The reasons which here

100 lead us to a contrary conclusion are three: first, it will generally be true that dividends declared within the year have been in part accumulated at the beginning of the year; second, it is not likely that Congress should have meant to distinguish between dividends and interest, rents and the like; and third, the general purpose of the section seems to favor the Commissioner's interpretation. As for the first, while it is true that shareholders have no right to accumulated earnings until they are declared, except as they may insist upon the exercise of an honest judgment by their directors, it is equally true that collectively they are the beneficial owners of earnings, as of the other corporate assets. It would certainly not be unreasonable to suppose
101 that Congress might look upon shares which should be valued at the end of a year as separable from earnings already accumulated at the beginning. True, this would not go the whole length of the regulation, which made no distinction between dividends declared from accumulated earnings and others. Nevertheless, it is a consideration not without its weight, for the result of the plaintiff's construction is to allow accumulated earnings to escape taxation, except in so far as there may chance to be equal accumulations a year later.

This consideration would, however, scarcely have been enough, had the statute applied only to shares; in fact it
102 covered all kinds of property. It may be that, even so, the regulation included too much; we own it is a little hard to see how unplanted crops or unconceived offspring can be said to be part of the land or of the livestock of which a decedent dies possessed. But we are dealing with the income from investments, and the regulation need be valid only so far; and we think it unlikely that Congress should have distinguished between the different kinds of income from investments, especially as even that kind which by hypothesis is to be excepted (dividends) is itself subject to internal division between accumulated and unaccumulated

earnings. Practically, investors do not think of the income 103
from their securities as differing, because they have separately enforceable rights in the case of debts, leases, etc., and none in the case of shares of stock; they think of all as interchangeably income from investments. That does not of course determine on which side such income as a whole should fall (that is, whether it should all be treated as separable or as inseparable) but it does demand that a single disposition should be made of it; and the statute was not so plain as to forbid deciding for separability, whatever might have been the result, if shares of stock had alone been concerned.

Finally, the apparent purpose of the statute fortifies our 104
conclusion. The hardship which Congress meant to relieve was that, due to the inevitable delays of administration, legatees did not have a chance to realize the values at death from the securities of the estate, either for the payment of taxes, or for any other purpose. The actual values at that time were therefore illusory, and it was thought unfair to assess them upon what for them did not really exist. They were therefore allowed to substitute other values which they could in fact realize; the estate was to be taxed at what it was worth when it really became accessible. Surely that included not only the securities as they stood at the end of the year, but the income they had produced meanwhile. The plaintiffs wish, how- 105
ever, not only to disregard the inaccessible values, but a part of the accessible; and this they do through the fiction of relating back the values at the end of the year to its beginning, when they did not represent the value of anything whatever. There is not the least reason to suppose that Congress intended to give them that relief; nor does justice demand it. If they are not to be assessed upon what is practically beyond their reach, they should certainly be compelled to accept in its stead the total of what is practically within it. It is quite idle to invoke the

106 presumption against double taxation; the privilege is an option; if the taxpayers wish not to be subject to both estate and income taxes, they may always escape by accepting an assessment as of the time of death.

Judgment affirmed.

CHASE, *Circuit Judge* (dissenting):

As Section 202 (a) of the Revenue Act of 1935 but gave to executors an option, it is plain enough that Congress might impose such conditions upon its exercise as it saw fit.

But if Congress did intend to do what Article 11 of
107 T. R. 80 provides, and the majority has held the statute means, it chose a strange way to do it. Had that been the intention of Congress, it would have been easy to have said in plain words that that was one of the conditions attached to the option given. Because it did not do so but on the contrary simply provided that an executor might have the property in the estate at death valued as of a year later instead of taking the valuation as of the date of death, I think the ordinary distinction which is recognized throughout the income and estate taxing statutes between what is usually regarded as income as distinguished from principal was intended to be maintained.
108 It follows that I cannot accept the abstract reasoning of the regulation which the majority opinion approves as a permissible interpretation of a statute relating to taxation where the ordinary meaning of the language used is to be given effect.

Though intangibles are only one form of property involved, they will serve well enough for the purposes of illustration. They are, within common knowledge, bought and sold at prices which vary with the amount of accrued interest at the date of sale but not with interest to accrue in the future and it would probably seem strange to most

such sellers or purchasers to have the principal and the 109
so-called right to wholly unearned future interest valued separately as property. Unearned income from intangibles is generally treated as nothing but an expectancy which is merely an incident of the ownership of the intangibles themselves. Where there is an express promise to pay stated amounts of interest at stated times in the future there is always the express or implied understanding that the payment is compensation for withholding the principal from the owner for the time stated. When a bond, for instance, is valued as of any date, the rate of interest it bears is an important consideration. But if the concept of valuation now approved is right, then every bond alike 110
in every respect except the interest rate would be worth the same amount at any given time regardless of the interest rate and any variation in the price attributable to a differing earning power by way of interest would be reflected in a separate valuation of the right to receive interest to accrue in the future apart from the bond itself. The difficulty in respect to ordinary stock and the dividends which may or may not be declared seems even greater.

I do not suggest that such concepts of property are impossible but only that they are so unusual that they are too much to load upon the language of this statute. To make them even approach the realm of practical economic 111
reality in which taxation is to be kept and prevent unwarranted extension of a statute like this by implication, see *United States* v. *Merriam*, 263 U. S. 179, 187, one would have to believe that it was both feasible and customary in a business sense to purchase and sell the so-called property consisting of the right to receive in the future unearned interest or income from intangibles as something separate and distinct from the ownership of the intangibles themselves. And, what is of even greater significance, it would also be necessary to believe that Congress meant to legislate on

112 such a basis, rather than to say in simple words that, if the option offered was exercised, the estate income received by the executor during the year must be treated as though he had sold or otherwise disposed of property of a value equal to the amount of income received. And finally one must believe that Congress, without actually saying so, did intend to exact a price for the option made up in part by increasing the gross estate to the extent of gross income received during the year and to tax as property at the date of death not only the net income received but in effect the expense of getting it as well. I think Article 11 of T. R. 80 goes beyond a fair and reasonable interpretation of the statute and that it is consequently invalid. *Manhattan*
113 *General Equipment Co.* v. *Commissioner*, 297 U. S. 129.

114

Order for Mandate.

115

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 24th day of April one thousand nine hundred and forty.

Present—HON. LEARNED HAND,
HON. HARRIE B. CHASE,
HON. CHARLES E. CLARK,
Circuit Judges.

116

JOSEPH I. SAKS and HERBERT H. MAASS, as executors of Ida H. Saks, deceased,

Plaintiffs-Appellants,

v.

JOSEPH T. HIGGINS, Collector,

Defendant-Appellee.

117

Appeal from the District Court of the United States for the Southern District of New York.

This cause came on to be heard on the transcript of record from the District Court of the United States for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs.

Order for Mandate.

118 It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

D. E. ROBERTS.
Clerk.

(Back)

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

119

JOSEPH I. SAKS and HERBERT H. MAASS, as executors, etc.,

v.

JOSEPH T. HIGGINS, Collector.

ORDER FOR MANDATE

120

United States Circuit Court of Appeals
Second Circuit
Filed Apr. 24, 1940
D. E. Roberts, Clerk.

Clerk's Certificate.

UNITED STATES OF AMERICA,

SOUTHERN DISTRICT OF NEW YORK.

I, D. E. ROBERTS, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 40, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of

JOSEPH I. SAKS and HERBERT H. MAASS, as executors of Ida H. Saks, deceased,

Plaintiffs-Appellants,

—against—

JOSEPH T. HIGGINS, Collector,

Defendant-Appellee,

as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this 31st day of May, in the year of our Lord one thousand nine hundred and forty, and of the Independence of the said United States the one hundred and sixty-fourth.

D. E. ROBERTS,
Clerk.

(Seal)

SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed October 14, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

(1675)

FILE COPY

Office - Supreme Court, U. S.
FILED
JUL 23 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term, 1940.

No. 274

HERBERT H. MAASS, as Sole Surviving Executor of the Last Will and Testament of Ida H. Saks, Deceased,

Petitioner,

—against—

JOSEPH T. HIGGINS, Collector of Internal Revenue for the Third District of New York,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT AND BRIEF IN SUPPORT THEREOF.

WILBUR C. DAVIDSON,
Counsel for Petitioner.

HERBERT H. MAASS,
DAVID J. LEVY,
Of Counsel.

July, 1940.

THE COURT PRESS, N. Y. C.

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United States v. *Safety Car Heating Co.*, 297 U. S. 88. 13

United States v. *Supple-Biddle Hardware Co.*, 265 U. S. 189, 196 16

OTHER AUTHORITIES CITED:

18 Chicago-Kent Law Rev., March 1940, pages 152-163 16

Committee of Conference on the Revenue Bill of 1935 (74th Congress, 1st Sess.. H. R. No. 1885, pp. 10-11) 15, 22

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IN THE

Supreme Court of the United States

October Term, 1940.

No.

HERBERT H. MAASS, as Sole Surviving Executor of the Last Will and Testament of Ida H. Saks, Deceased,

Petitioner,

—against—

JOSEPH T. HIGGINS, Collector of Internal Revenue for the Third District of New York,

Respondent.

Petition for Writ of Certiorari to the Circuit Court of Appeals for the Second Circuit and Brief in Support Thereof.

Petitioner respectfully prays that a writ of certiorari issue to review a judgment of the Circuit Court of Appeals for the Second Circuit affirming, by a divided court, a judgment of the District Court for the Southern District of New York in favor of the defendant in an action to recover a refund of Federal estate taxes.

Opinions Below.

The case was known below *sub. nom. Saks* v. *Higgins,* the change in title here occurring because of the death of one of the plaintiffs-executors.

The opinion of the District Court (R. 17-24) is reported in 29 F. Supp. 996. The opinions of the Circuit Court of Appeals (R. 31-38) are reported in 111 F. (2d) 78. The majority opinion was written by Judge Learned Hand and the dissenting opinion by Judge Chase.

Jurisdiction.

The judgment of the Circuit Court of Appeals was entered on April 24, 1940 (R. 39). The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

Question Presented.

When an estate exercises the option provided in Section 302 (j) of the Revenue Act of 1926, as added by Section 202 (a) of the Revenue Act of 1935, to have the value of the gross estate determined, for Federal estate tax purposes, as of the date one year after the decedent's death, or other "optional valuation date" (instead of as of the date of death), must there be included therein, in addition to the principal assets of the estate, the income earned upon such principal assets after the date of death and up to such optional valuation date, as directed by Regulations 80, Article 11, of the Treasury Department, or is such regulation an invalid extension of the statute?

Statutes and Regulations Involved.

The pertinent statutes and regulations involved are set forth in Appendix A, *infra,* pages 17-21.

Statement.

Inasmuch as only an issue of law was involved, the case was heard below on the cross-motions of the respective parties for judgment on the pleadings.

Ida H. Saks died on August 30, 1936. Her executors duly filed the Federal estate tax return, and elected to have the estate valued at the "optional valuation date", rather than as of the date of death, as allowed by Section 202 (a) of the Revenue Act of 1935.

Pursuant to the provisions of Article 11, Regulations 80, the Commissioner of Internal Revenue included in the taxable estate not only the capital value as of the proper valuation date of all of the capital assets comprising the estate of the decedent at the date of her death, but also the sum of $19,956.32, representing income which was not any part of the property of the decedent at the time of her death, but on the contrary consisted of interest, dividends and rents earned by and upon the property and assets of the estate between the date of the decedent's death and the optional valuation date (Complaint, Par. 6, R. 5, as amended by Stipulation, R. 12, and not denied by Answer, R. 13-14). The Federal estate tax which was thereafter assessed upon this basis was duly paid, and claim for refund was filed and rejected, resulting in this suit to recover the excess tax of $3,952.45.

The District Court decided in favor of the respondent, and the Circuit Court of Appeals affirmed by a divided court.

Specifications of Errors To Be Urged.

The Court below erred—

(1) In holding that the income earned by the

estate subsequent to death should be included in the gross taxable estate under Section 302 (j) of the Revenue Act of 1926, as added by Section 202 (a) of the Revenue Act of 1935, and that Article 11 of Regulations 80 was in that regard valid.

(2) In determining that the claim for refund herein was properly rejected, and accordingly dismissing the complaint.

Reasons for Granting the Writ.

1. This case presents for the first time in this Court an important question of Federal estate taxation which should be settled by this Court. The statute in question gives the executor of a decedent's estate the right at his election to value assets owned by the decedent at the time of his death as of the date one year after death, or other applicable date in the case of assets disposed of during the one-year period. The statute in terms does not require that income accruing between those dates be included in the gross estate, but the regulation so provides, and this case challenges the validity of that regulation. The question of the correctness of the regulation is one of wide public interest and importance, and is likely to arise in the case of every decedent's estate of sufficient size to require the filing of a Federal estate tax return, where assets decline in value during the period of one year after death.

The petitioner, for the purpose of showing in this petition the importance of the question here involved in terms of its effect on other cases, has endeavored without success to obtain from official sources a statement showing the approximate number of estates pending in the Bureau of Internal Revenue, the Board of Tax Appeals, and the Courts in which this question is presented, and an approximation of the amount of

taxes involved up to the present time. In view of the inability to obtain such official figures or approximations, petitioner begs leave to suggest to this Court the wide interest in this case by pointing out that counsel herein have received inquiries from more than one hundred different lawyers, with offices located in nineteen States of the Union* (at least one state being in each of the ten judicial circuits), and the District of Columbia, all of whom have stated that they represent at least one, and in many instances several, estates in which this question is involved, and have indicated that they will look for a definitive decision from this Court, if possible in this case.

In addition to the present case, this question has been passed upon in the following reported cases: *Clark* v. *United States* (D. C. for Dist. of Md.), 33 F. Supp. 216; *Estate of Cordelia Y. Abendroth* v. *Commissioner* and *Estate of Kate Read Blacque* v. *Commissioner,* 41 B. T. A. No. 156; and in the following cases decided by the Board of Tax Appeals in memorandum opinions and not reported officially: *Estate of Benjamin M. Spurr* v. *Commissioner,* decided May 18, 1940; *Estate of Gertrude Eaton* v. *Commissioner,* decided May 20, 1940; *Estate of Harriet I. J. Singer* v. *Commissioner,* decided June 5, 1940; and *Estate of Catherina Loffler* v. *Commissioner,* decided June 15, 1940 (which cases are reported in Commerce Clearing House B. T. A. Service as Decisions numbered, respectively, 11,110-C, 11,110-H, 11,217-A, and 11,230-A).

Petitions were filed on July 5, 1940, for review by the Circuit Court of Appeals for the Second Circuit of the decisions in the *Abendroth* and *Blacque*

* California, Colorado, Connecticut, Florida, Illinois, Indiana, Iowa, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, New Jersey, New York, Ohio, Pennsylvania, West Virginia and Wisconsin.

cases, and the petitioner has been informed by counsel that petitions will be filed for review by the Circuit Court of Appeals for the First Circuit of the decision in the *Eaton* case, and by the Circuit Court of Appeals for the Fourth Circuit of the decision in the *Spurr* case. The time for an appeal to the Circuit Court of Appeals for the Fourth Circuit in the *Clark* case, in which the Government lost, has not yet expired, and the petitioner is informed by counsel for the taxpayer in that case that an appeal has been recommended by the Chief Counsel for the Bureau of Internal Revenue and is now under consideration in the office of the Solicitor General.

The large number of cases to which reference is made above have arisen in a period of only four years during which estate tax returns presenting this question have been filed. It is quite likely that the number of such cases will increase rapidly each year. It seems apparent that with the large number of such cases which have arisen and will continue to arise in all parts of the United States, this question eventually will be decided by this Court, and that extended litigation will be avoided if a writ of certiorari be granted in the instant case.

2. The decided cases referred to above present considerable conflict of opinion as to whether the regulations are or are not warranted by the statute. In the present case the majority of the Circuit Court of Appeals upheld the regulations, while Judge Chase, in a dissenting opinion, took the position that the statute did not require the inclusion of income earned after the date of death. In the *Abendroth* and *Blacque* cases, which arose from the State of New York, the majority of the Board of Tax Appeals, without setting forth their independent views on the question, merely took the position that the decision of the Circuit Court of Appeals in the

present case should be followed, while four members of the Board, in a dissenting opinion, expressed their views that the regulations were so clearly unwarranted by the statute that the decision below should not be followed even in a case arising in the Second Circuit. In the case of *Clark* v. *United States,* Judge Chesnut, in a fully considered opinion, and with the opinions of the Circuit Court of Appeals in this case before him, dealt with all phases of the question, in effect refused to follow the Second Circuit Court of Appeals majority, and held that the regulations were invalid and did not require the inclusion of such income.

This uncertainty has left estate representatives impaled upon the horns of a dilemma. The "optional valuation" amendment requires that the election as to basis of valuation shall be made in the return. This election is final and irrevocable. Therefore the estate representative should know when making his return which basis of valuation will result in the lower tax for the estate. In the present unsettled state of the law as to whether the income must be included, the estate representative cannot make an intelligent decision. The amount of the estate on the optional basis *exclusive* of income may be less than at the date of death, but inclusive of income it may be more. Whether the income must be included or not is unknown. The estate must, therefore, chart a course in the dark and may be wrong whichever fork in the road it may take. In order, therefore, that estates may not in large measure be deprived of the benefit and relief which Congress intended to afford by the optional valuation amendment, it is of vital importance that the question at issue be settled *immediately* rather than after the usual conflict between circuits may develop, particularly since the question will in all likelihood eventually be passed upon by this Court in any event.

Conclusion.

For the foregoing reasons, it is respectfully submitted that this petition for a writ of certiorari should be granted.

Respectfully submitted,

WILBUR C. DAVIDSON,
Counsel for Petitioner.

HERBERT H. MAASS,
DAVID J. LEVY,
Of Counsel.

July, 1940.

BRIEF IN SUPPORT OF THE PETITION.

Argument.

The statute in unambiguous language provides that where the election to use the optional valuation dates is exercised the value of the gross estate shall be determined "by valuing all the property included therein on the date of the decedent's death" as of the optional valuation dates. Therefore, unless the income earned by the assets of the estate during the intervening period is part of the property owned on the date of death, it cannot be included.

The regulations recognize this and for that reason evolve the theory that all "property" is an aggregation of "rights", and that such "rights" exist on the date of death as appurtenances to the capital assets. Thus, it is said that in the case of bonds the "right" to interest is a property right in existence on the date of death; similarly, in the case of stocks the "right" to dividends is an asset in existence on the date of death appurtenant to the corporate stock, and that the same theory applies generally to all capital assets. The regulation then says that when such interest or dividends are collected during the optional year the "right" is to that extent disposed of and the amount received represents the value of the "right" which must be included.

However, as was well stated in the opinion in *Clark* v. *United States* (33 F. Supp. at p. 219), the statute does not make any change in the concept of gross estate which has always existed, and does not make any change in the "property" which is to be included in the gross estate. A bond has never before been treated for estate tax purposes as being anything but an indivisible unit, embodying a promise to pay principal at maturity and to pay

interest for the use of the principal sum until maturity. Interest accrues from day to day, and there is not even a right to receive such interest until it has accrued. Similarly there is no right to receive dividends on corporate stock until they have been declared, and there is no right to receive rents of real property until they have accrued.

As Judge Chase in his dissenting opinion below said:

> "'Any earned income from intangibles is generally treated as nothing but an expectancy which is merely an incident of ownership of the intangibles themselves.'"

Even the majority opinion below recognizes the difficulty of applying the theory of the regulation to such things as crops grown after death upon land owned by the decedent, and the progeny born after the decedent's death of live stock owned by him, since it can hardly be said that such crops or progeny were part of the estate at death. The same difficulty is apparent as to the rents collected after death upon real property which is vacant and non-income producing at the date of death.

That the items of income in question are subject to income tax is not open to dispute, but the position of the regulations is that the same items which are subject to income tax to the estate as income *earned* on the assets *after* the date of death, are subject also to estate tax as being *property* owned by the decedent on the *date of death*. It is submitted that the two theories are conflicting and cannot be reconciled.

As was said in the *Clark* case (33 F. Supp. at p. 221):

> "Income from the property thereafter arising does not belong to the decedent at his death, and

> the right to the possession and enjoyment thereof which came into being after his death belong not to the decedent but to his successors in ownership. To impose the tax on subsequently accruing income is to put it on property belonging not to the decedent but to his successors. It seems a pure abstraction not based on economic realities to say that income received by beneficiaries of the decedent after his death was a part of his gross estate at the time of his death."

Likewise, as was stated in the dissenting opinion of four members of the Board of Tax Appeals in the *Abendroth* and *Blacque* cases:

> "Interest earned after decedent's death and ordinary dividends declared and paid after decedent's death are not items of property on hand at decedent's death. They are not items which represent mere increase in value. They are items of property which have been acquired by the estate since decedent's death and are not taxable to the estate."

The fundamental distinction between an item of principal, which is subject to estate tax, and an item of income earned after death, which is subject only to income tax, was recognized by this Court in *Bull* v. *United States*, 295 U. S. 247. In that case the estate of a deceased member of a partnership deriving its income solely from personal services and in which no capital was invested was entitled for a period of one year after decedent's death to "receive the same interests, or participate in the losses to the same extent" as the deceased partner would if living. The question presented was whether the amount which the estate received as its share of the partnership income during the one-year period was subject to

estate tax as well as income tax. The court held that such amount was not subject to estate tax but was subject to income tax alone. In discussing the Government's argument that the amount in question was subject to estate tax, the court said that the contention was that the Government was entitled to both estate tax and income tax by reason of the *right* conferred on the estate by the partnership agreement and the *fruits* of it. In rejecting that contention, the Court said, at pages 255-256:

> "We are told that since the right to profits is distinct from the profits actually collected we cannot now say more than that perhaps the Commissioner put too high a value on the contract right when he valued it as equal to the amount of profits received—$212,718.99. This error, if error it was, the Government says is now beyond correction.
>
> "While, as we have said, the same sum may in different aspects be used for the computation of both an income and an estate tax, this fact will not here serve to justify the Commissioner's rulings. They were inconsistent. The identical money—not a right to receive the amount, on the one hand, and actual receipt resulting from that right on the other—was the basis of two assessments. The double taxation involved in this inconsistent treatment of that sum of money is made clear by the lower court's finding we have quoted."

Thus, the error of the Government in that case, as in this, was in confusing any rights which may have been embodied in the principal asset as of the date of death with the fruits of such rights which were derived as income after the date of death. The regulations here in question ignore the nature of income as something arising or flowing out of principal, and

not a growth or increment in value of principal. *Eisner* v. *Macomber*, 252 U. S. 189, 207; *United States* v. *Phellis*, 257 U. S. 156, 159; *Clark* v. *United States*, *supra* (33 F. Supp. at p. 221).

The distinction between income from capital and the mere expectancy of future income inherent in the capital itself, which distinction the regulations ignore here, was recognized by this Court in *United States* v. *Safety Car Heating Co.*, 297 U. S. 88. It was there held that a conditional, contingent claim for patent infringement held by a patentee on March 1, 1913, was not a capital asset on that date; that in addition to the patent he had "an expectancy of income, or income, more accurately, in the process of becoming"; that the income subsequently derived from the patent was "the fruit" that was "born of capital"; that such fruit was different from "the potency of fruition" which the taxpayer had on March 1, 1913, and that therefore the amount of the claim collected after March 1, 1913, was taxable income in the year of receipt, and not merely the realization of an asset owned on March 1, 1913.

The present case does not involve liquidating or other capital distributions which might deplete the value of the asset owned on the date of death, but involves only interest, dividends and rents earned by and upon the property and assets of the estate subsequent to the date of death. While a liquidating dividend or capital distribution might deplete the capital asset, that is not true of an ordinary dividend earned on stock. *Lynch* v. *Hornby*, 247 U. S. 339. We know of no ground for saying that rent paid for the use of real property or interest paid for the use of borrowed money is part of the property or money itself.

We might mention further another factor that makes the regulation subject to grave question, *i. e.*, that if the regulation is proper the gross income may

be included without regard to operating costs producing it. So, if real estate exists in an estate, and it yields rent, the taxes, interest and other carrying charges cannot even be deducted in determining the amount of income to be subjected to tax, this for the reason that there is no authority, either in the statute or in the regulation for deducting such items. The same holds true of other forms of income. It would seem that if Congress had intended that the income should be subjected to estate tax, it would have made provision for the deduction of the cost of production, and would not have discriminated as between income on the one hand in the form of interest and dividends, which of its very nature is immediately upon receipt *net* income to the estate, and on the other such forms of income as rents or crops, which are usually only *gross* income, and only become net income after deduction of operating charges. These matters only serve to illustrate further what seems to us the palpable impropriety of the regulation.

It is submitted that the reasoning of the majority opinion below relates chiefly to the validity of a statute which might require, as a condition precedent to the exercise of the option, that the income be included, and that it does not consider adequately the question at issue of whether the statute does so require. As judge Chase said in his dissenting opinion (111 F. (2d) at pp. 80-81) if Congress had intended any such result it would have been a simple matter so to provide in plain words in the statute, and since the statute does not so provide there is no reason for indulging in abstractions in order to disregard the ordinary distinction recognized throughout the income and estate tax statutes between what is usually regarded as principal and as income. See the language of Judge Chesnut to the same effect in *Clark* v. *United States* (33 F. Supp. at pp. 221-222). Since the statute does not provide for including such income, it may not be ex-

tended by the regulations. *Manhattan General Equipment Co.* v. *Commissioner,* 297 U. S. 129, 134; *Koshland* v. *Heivering,* 298 U. S. 441, 447.

If the statute is clear and unambiguous in failing to require the inclusion of income, as its language appears to indicate, there is no need for interpretation. If the language is ambiguous and there is doubt as to its meaning, the intention of Congress in enacting the statute becomes important.

The intention of Congress as indicated by the committee reports was not referred to in the opinions below but was discussed in the opinion in *Clark* v. *United States, supra* (33 F. Supp. at pp. 222-223).

The committee reports show that the statute in question was remedial in purpose and was designed to relieve estates of the hardships caused by the declining values which in many cases made it impossible for the estate to realize enough on the assets to pay the estate tax. The period of one year after death was selected as the normal period of administration during which the executor could make an orderly liquidation of the assets and provide for the payment of charges against the estate, including taxes (74th Congress, 1st Sess. S. R. 1240, pp. 9-10).

The applicable provisions of the report of the Committee of Conference on the Revenue Bill of 1935 (74th Congress, 1st Sess. H. R. No. 1885, pp. 10-11) are set forth in Appendix B hereof, *infra,* pages 22-23.

There is nothing in the committee reports to indicate that Congress intended to make it a condition to the exercise of the election that there be included, in addition to the assets owned on the date of death, the income thereafter arising. On the contrary, the illustration set forth in the committee reports of the operation of the statute shows that there was no such intention. Thus, although the illustration refers to income-producing assets consisting of real estate,

corporate stock and bonds, the figures showing the value of such assets on the optional valuation dates do not include any income accruing after the date of death. It is submitted that the committee reports show that Congress did not intend that such income be included.

Text writers and commentators have uniformly expressed the opinion that the regulation in question is invalid because inconsistent with the statute itself. Montgomery, Federal Taxes on Estates, Trusts and Gifts (1938-39 Ed.), page 230; Hughes, Federal Death Taxes (1938 Ed.), page 310; Pennsylvania Bar Association Quarterly No. 34, pages 100, 105; "Taxes", March 1939, pages 145-6; 18 Chicago-Kent Law Rev. March 1940, pages 152-163.

Furthermore, in interpreting the statute it should be construed in such manner as to avoid the imposition of an estate tax in addition to an income tax on the same income. *United States* v. *Supple-Biddle Hardware Co.*, 265 U. S. 189, 196; *Bull* v. *United States*, 295 U. S. 247, 255-6; *Nichols* v. *United States*, 64 Ct. Cls. 241, 246, cert. den. 277 U. S. 584.

CONCLUSION.

In order to resolve the grave doubt as to the correctness of the decision below, to forestall wide and protracted litigation and to insure to estates the opportunity to exercise intelligently the option granted by Congress, it is respectfully submitted that the writ of certiorari should be granted.

Respectfully submitted,

WILBUR C. DAVIDSON,
Counsel for Petitioner.

HERBERT H. MAASS,
DAVID J. LEVY,
Of Counsel.

July, 1940.

APPENDIX A.

Statutes and Regulations Involved.

Statute.

Sections 302 and 302(a) of the Revenue Act of 1926, as amended by Section 404 of the Revenue Act of 1934:

> "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside the United States—
>
> (a) To the extent of the interest therein of the decedent at the time of his death."

Section 302(j) of the Revenue Act of 1926, as added by Section 202 of the Revenue Act of 1935:

> "If the executor so elects upon his return (if filed within the time prescribed by law or prescribed by the Commissioner in pursuance of law), the value of the gross estate shall be determined by valuing all the property included therein on the date of the decedent's death as of the date one year after the decedent's death, except that (1) property included in the gross estate on the date of death, and, within one year after the decedent's death, distributed by the executor (or, in the case of property included in the gross estate under subdivision (c), (d), or (f) of this section, distributed by the trustee under the instrument of transfer), or sold, exchanged, or otherwise disposed of, shall be included at its value as of the time of such distribution, sale, exchange, or other disposition, whichever first occurs, instead of its value as of the date one year

after the decedent's death, and (2) any interest or estate which is affected by mere lapse of time shall be included at its value as of the time of death (instead of the later date) with adjustment for any difference in its value as of the later date not due to mere lapse of time. No deduction under this title of any item shall be allowed if allowance for such item is in effect given by the valuation under this subdivision. Wherever in any other subdivision or section of this title or in Title II of the Revenue Act of 1932, reference is made to the value of property at the time of the decedent's death, such reference shall be deemed to refer to the value of such property used in determining the value of the gross estate. In case of an election made by the executor under this subdivision, then for the purposes of the deduction under section 303(a)(3) or section 303(b)(3), any bequest, legacy, devise, or transfer enumerated therein shall be valued as of the date of decedent's death with adjustment for any difference in value (not due to mere lapse of time or the occurrence or non-occurrence of a contingency) of the property as of the date one year after the decedent's death (substituting the date of sale or exchange in the case of property sold or exchanged during such one-year period)."

Regulation.

Article 11, Regulations 80 (in part):

"Art. 11.—Optional Valuation Date.—In general, the object of subdivision (j) of section 302 is to make provision whereby the amount of tax otherwise payable may be lessened when, within the year following the decedent's death, the gross

estate has suffered a shrinkage in its aggregate value.

"If the decedent died after August 30, 1935, the executor may, by an election upon his return, Form 706, if filed within the time prescribed by law or prescribed by the Commissioner in pursuance of law, have the property which was included in the gross estate on the date of the decedent's death valued as of the applicable dates, as follows:

"(1) Any property distributed, sold, exchanged, or otherwise disposed of within one year after the decedent's death, valued as of the date of such distribution, sale, exchange, or other disposition, whichever first occurs;

"(2) Any property not distributed, sold, exchanged, or otherwise disposed of within such one-year period, valued as of the date one year after the date of decedent's death;

"(3) Any property, interest, or estate which is affected by mere lapse of time, valued as of the date of decedent's death; except that an adjustment is to be made for any difference in its value, not due to such lapse of time, as of the date one year after the date of decedent's death, or as of the date of its distribution, sale, exchange, or other disposition, whichever date first occurs.

* * *

"The property to be valued as of one year after the date of decedent's death, or as of date of decedent's death, or as of some intermediate date, is the property included in the gross estate on the date of the decedent's death. As property and its value are separate and distinct, the former denoting legal rights, the latter the monetary measure of such rights, and as subdivision (j)

treats of the two separately, it will be necessary in every case first to determine what property constituted the gross estate at decedent's death. Subdivisions of section 302, as amended, other than subdivision (j) supply the information necessary to that determination, subdivision (j) being, in the main, confined to the date or dates as to which the value is to be ascertained.

"Interest-bearing obligations, such as bonds and notes, embody two promises, one to pay principal and the other to pay interest, and both promises are a part of the gross estate at the death of the decedent * * *. If the valuation date is that of decedent's death, the principal of the obligation and interest then accrued and unpaid thereon are to be valued as of that date. If the valuation date is subsequent to death, the principal and interest then accrued and unpaid are to be valued as of that date. The valuation date of any part payment of principal or of any installment of interest, made between decedent's death and the date as at which the obligation is to be valued, will be the date of such payment. * * *

* * *

"When corporate stock is a part of the gross estate at decedent's death, and a dividend in partial liquidation is thereafter paid on or before the date as of which the stock is to be valued, the valuation date of such dividend will be the date of its payment. Similarly, a dividend paid within the same period out of earnings, whether the earnings are made or accumulated prior or subsequent to decedent's death, will be valued as of the date of its payment. Earnings of the corporation neither declared as a dividend nor paid between decedent's death and the valuation date of the stock, will be reflected in the value of the

stock. But a dividend declared prior to the valuation date of the stock and payable subsequent thereto will not be so reflected if the stock is selling 'ex dividend' on such valuation date, but is to be valued as of that date.

"Differing from payments of principal and interest in the case of bonds and notes, those made upon a judgment are not pursuant to a promise but to an obligation imposed by law, which obligation, in its totality, is a part of the gross estate at decedent's death if coming within any of the other subdivisions of section 302, as amended. So, too, liquidating dividends and dividends paid from earnings are not pursuant to a promise but are referable to legal rights inherent in stock ownership. * * *

* * *

"The election is available to the executor only at the time the return is filed, and only if the return is filed within fifteen months from the decedent's death, or within the period of an extension of time for filing * * *. The election applies to all the property included in the gross estate on the date of the decedent's death. It cannot be applied only to a portion of such property. The election, if exercised, cannot be rescinded."

APPENDIX B.

Conference Report of the Senate and House Committees—No. House Report 1885.

"The amendment also allows an additional deduction in computing the value of net estate, of the net shrinkage in value of assets arising from the difference in the aggregate value of assets forming part of the decedent's gross estate on the date of death and the aggregate value of such assets one year thereafter, substituting the date of sale or exchange by the executor in the case of assets sold or exchanged during such one year period. In lieu of this provision, the conference action inserts a provision giving the executor an election with respect to the time as of which the property included in the gross estate is to be valued. Under existing law the valuation is made as of the date of death. If the executor exercises the election given him by the conference agreement, all the property included in the estate on the date of death, is to be valued as of the date one year after the decedent's death, except that the value (at the time of distribution, sale, exchange or other distribution) of property distributed, sold, exchanged, or otherwise disposed of, is taken in lieu of its value as of one year after death. Unless the decedent owns an interest or estate, the value of which is affected by mere lapse of time, the value used under the election is the value as of date of death adjusted for change in value not due merely to lapse of time. Deductions for loss from fire, other casualty, etc., and other deductions are disallowed if reflected in the latter valuation of the property. * * * The operation of the new provision giving the executor the election may be shown by the following example:

"A decedent dies owning real estate of the value of $100,000; corporate stock of the value of $60,000;

bonds of the value of $20,000; foreign government bonds maturing nine months after date of death of a face value of $10,000 but of a value of $9,550; and cash amounting to $5,000. These are values as of date of death. The gross estate at date of death amounts therefore to $194,550. The decedent had debts of $15,000 and the administration expenses were $25,000, which debts and expenses were promptly paid by the executor. The value of the net estate as of the date of death was, therefore (after taking off the specific exemption), $114,550. Six months after the decedent's death the executor distributed the bonds to legatees under the will, at which time they were worth $18,000, and he sold all the corporate stock owned by the decedent for a fair market value of $50,000 in order to raise cash to pay the debts and expenses. The foreign bonds were paid in full at maturity. During the first year after the decedent's death the value of his real estate depreciated $5,000. The executor elects to take advantage of the new provision of the bill. The value will be arrived at in the following way:

ASSETS

Real estate (as of one year after death)		$105,000.00
Corporate stock (as of date of sale)		50,000.00
Bonds (as of date of distribution)		18,000.00
Foreign Bonds (as of date of maturity)		10,000.00
Cash		5,000.00
Gross estate		$188,000.00

DEDUCTIONS

Debts	$15,000.00	
Administration expenses	25,000.00	
Specific exemption	40,000.00	80,000.00
Net estate		$108,000.00"

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No. 274.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

HERBERT H. MAASS, as Sole Surviving Executor of the Last Will and Testament of IDA H. SAKS, Deceased, *Petitioner*,

v.

JOSEPH T. HIGGINS, COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK, *Respondent*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR THE PETITIONER.

WILBUR C. DAVIDSON,
Counsel for Petitioner.

Of Counsel:
HERBERT H. MAASS,
DAVID J. LEVY,
New York, N. Y.
MELVILLE F. WESTON,
Boston, Mass.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940

No. 274

HERBERT H. MAASS, as Sole Surviving Executor of the Last Will and Testament of IDA H. SAKS, Deceased, *Petitioner*,

v.

JOSEPH T. HIGGINS, COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK, *Respondent*.

On Writ of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

BRIEF FOR THE PETITIONER.

OPINIONS BELOW.

The case was known below *sub nom. Saks* v. *Higgins*, the change in title in this Court being due to the death of one of the plaintiffs below.

The opinion of the district court (R. 17) is reported in 29 F. Supp. 996. The opinions of the circuit court of appeals (R. 31) are reported in 111 F. (2d) 78.

JURISDICTION.

The judgment of the circuit court of appeals was entered on April 24, 1940 (R. 39). The petition for a writ of certiorari was filed July 23, 1940, and was granted October 14, 1940 (R. 42). The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED.

Whether, when the executor elects, under Section 302(j) of the Revenue Act of 1926, as added by Section 202 of the Revenue Act of 1935, now Internal Revenue Code, Section 811(j), to have the property included in the gross estate on the date of the decedent's death valued as of the optional valuation dates, rather than at the date of death, there must be included in the valuation of the gross estate the income earned by such property between the date of death and the optional valuation dates, as provided in Article 11 of Treasury Regulations 80 (1937 ed.).

STATUTE AND REGULATION INVOLVED.

The Revenue Act of 1935, Sec. 202(a), amended Section 302 of the Revenue Act of 1926, (now known as Internal Revenue Code, Section 811), by adding a new subdivision, the pertinent portion of which is as follows:

> (j) Optional valuation. If the executor so elects upon his return (if filed within the time prescribed by law or prescribed by the Commissioner in pursuance of law[1]), the value of the gross estate shall be determined by valuing all the property included therein on the date of the decedent's death as of the date one year after the decedent's death, except that (1) property included in the gross estate on the date of death and, within one year after the decedent's death, distributed by the exec-

[1] The executor is required to file the return within fifteen months from the date of death. Internal Revenue Code, § 821 (b); Reg. 80, Art. 63 (1937 ed.).

utor * * * or sold, exchanged, or otherwise disposed of, shall be included at its value as of the time of such distribution, sale, exchange, or other disposition, whichever first occurs, instead of its value as of the date one year after the decedent's death, and (2) any interest or estate which is affected by mere lapse of time shall be included at its value as of the time of death (instead of the later date) with adjustment for any difference in its value as of the later date not due to mere lapse of time. * * *

Treasury Regulations 80 (1937 ed.), Article 11, is set out in full in the Appendix, p. 44. The following significant portions may be quoted here:

> * * * the executor may * * * have the property which was included in the gross estate on the date of the decedent's death valued as of the applicable dates, as follows:
>
> (1) Any property distributed, sold, exchanged, or otherwise disposed of within one year after the decedent's death, valued as of the date of such distribution, sale, exchange, or other disposition, whichever first occurs;
>
> (2) Any property not distributed, sold, exchanged, or otherwise disposed of within such 1-year period, valued as of the date one year after the date of the decedent's death;
>
> * * * * * *
>
> The property to be valued as of one year after the date of decedent's death, or as of date of decedent's death, or as of some intermediate date, is the property included in the gross estate on the date of the decedent's death. * * *
>
> [Interest]
>
> Interest-bearing obligations, such as bonds and notes, embody two promises, one to pay principal and the other to pay interest, and both promises are a part of the gross estate at the death of the decedent, if the obligation was then owned by him, or * * * at his death * * * was * * * within any of the other subdivisions of section 302 as amended. * * * If the valuation date is subsequent to death, the principal and interest then

accrued and unpaid are to be valued as of that date. The valuation date of any part payment of principal or of any installment of interest, made between decedent's death and the date as at which the obligation is to be valued, will be the date of such payment. Like rules will govern, so far as applicable, when any other obligation is involved, as, for example, one calling for the payment of rent or a royalty. Thus, in the case of rent, if the realty and the obligation to pay the rent reserved were parts of the gross estate at the time of decedent's death, the value of the former must be determined as of the applicable valuation date, and also the value of the rent then accrued and unpaid reserved by the latter. The valuation date of any rent paid in the interim pursuant to the rental obligation will be the date of its payment.

[Rents]

* * * * * *

[Dividends]

When corporate stock is a part of the gross estate at decedent's death, and a dividend in partial liquidation is thereafter paid on or before the date as of which the stock is to be valued, the valuation date of such dividend will be the date of its payment. Similarly, a dividend paid within the same period out of earnings, whether the earnings are made or accumulated prior or subsequent to decedent's death, will be valued as of the date of its payment. Earnings of the corporation neither declared as a dividend nor paid between decedent's death and the valuation date of the stock, will be reflected in the value of the stock. But a dividend declared prior to the valuation date of the stock and payable subsequent thereto will not be so reflected if the stock is selling "ex-dividend" on such valuation date, but is to be valued as of that date. * * * liquidating dividends and dividends paid from earnings are not pursuant to a promise but are referable to legal rights inherent in stock ownership.

STATEMENT.

The petitioner, with his co-executor since deceased, after claim for refund was denied, brought this suit in the District Court of the United States for the Southern District of New York against the collector to recover back an asserted overpayment of $3,952.45 in federal estate tax on the estate of Ida H. Saks (R. 4-7).

In substance, the complaint alleged (R. 4-7):

Ida H. Saks, the decedent, died on August 30, 1936 (R. 4). In filing the federal estate tax return on behalf of her estate, the executors elected to have the value of the gross estate determined by valuing the estate of the decedent as of the optional valuation date (R. 5).

Pursuant to the provisions of Treasury Regulations 80 (1937 ed.), Article 11, the Commissioner of Internal Revenue included in the amount of the gross estate the sum of $19,956.32, which was "not in fact property of the decedent belonging to her at the time of her death, but on the contrary represented income, to wit, rents, dividends and interest earned by and upon the property and assets of the estate subsequent to the date of death" of the decedent (R. 5, 12). The executors duly paid the tax thereafter assessed on this basis (R. 5-6). They filed a claim for refund which was rejected (R. 6, 8, 11).

The Collector answered (R. 13-14) raising no issue of material fact. Both parties brought on motions for judgment on the pleadings (R. 15, 16).

After hearing on the motions, the district court sustained the Collector's contention that the sum of $19,956.32, representing rents, dividends, and interest earned by the property and assets of the estate subsequent to the death of the decedent, was properly includible in valuing the gross estate and dismissed the complaint (R. 17-24, 25). The circuit court of appeals affirmed this judgment by a divided court (R. 31-38, 39).

SPECIFICATION OF ERRORS TO BE URGED.

The Circuit Court of Appeals erred:

1. In holding that the income earned by the estate subsequent to the death of the decedent should be included in the gross taxable estate under Section 302(j) of the Revenue Act of 1926, as added by Section 202(a) of the Revenue Act of 1935, and that Article 11 of Treasury Regulations 80 was in that regard valid.

2. In determining that the claim for refund herein was properly rejected and dismissing the complaint.

SUMMARY OF ARGUMENT.

Hereinafter, for purposes of simplicity, ordinary income earned by the estate of a decedent between the date of death and the optional valuation date, will be referred to as the "interim income". In the present case this "interim income" consisted, as said above, of rent, interest and dividends.

We respectfully assert that this interim income is not includable in valuing the gross estate of a decedent for estate tax purposes when the optional valuation date is used.

This conclusion is required

(a) By the ordinary and natural meaning of the language of the estate tax law, both what it says and what it does not say.

(b) By the history of Section 202 (a) of the Revenue Act of 1935, permitting the use of the optional valuation date, as it appears in the records of Congress.

(c) By the proper distinction between capital and income, as reflected in the estate tax law and the income tax law.

(d) By a critique of the argument which has been made for the inclusion of the interim income.

(e) By the specific evils—inequities and difficulties—to flow from requiring the inclusion of the interim income.

(f) By the applicable rules governing the construction of statutes and their interpretation through regulations.

We trust that what is said hereinafter may be read in conjunction with the opinions of the lower courts which have favored the construction for which we contend[2] and to which we assume the Court will advert, not because they have any authority here, but for their persuasive force.

ARGUMENT.

I.

THE OPTIONAL VALUATION STATUTE, SECTION 302(J), EFFECTED NO CHANGE IN THE BASIC PRINCIPLES OF THE ESTATE TAX LAW AND NEITHER EXPRESSLY NOR BY IMPLICATION REQUIRES THE INCLUSION OF THE INTERIM INCOME.

1. *Only the property which exists at death furnishes the measure of the tax.*—The estate tax, being levied upon the passing of the net estate from the decedent[3], has always

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[2] The dissenting opinion in *Saks* v. *Higgins*, 111 F. (2d) 78, 80 (C. C. A. 2). The opinion in *Clark* v. *United States*, 33 F. Supp. 216 (D. Md.). The dissenting opinion in *Estate of Abendroth* and *Estate of Blacque*, 41 B. T. A. 1178, 1179.

[3] The estate tax "is an excise imposed upon the transfer of or shifting in relationships to property at death." *United States Trust Co.* v. *Helvering*, 307 U. S. 57, 60. It "is a tax upon the transfer of his net estate by a decedent . . . It levies a sum equal to a certain percentage of the value of the net estate, and provides the criterion by which the net estate shall be ascertained." *Edwards* v. *Slocum*, 264 U. S. 61, 62-63. See also *Young Men's Christian Association* v. *Davis*, 264 U. S. 47, 50. *Chase National Bank* v. *United States*, 278 U. S. 327, 334. *Tyler* v. *United States*, 281 U. S. 497, 502. *United States* v. *Jacobs*, 306 U. S. 363, 367.

been measured, in the clearest terms, by the property existing at the date of death[4].

Prior to the Revenue Act of 1935 the property existing at the date of death was to be valued as at the date of death[5]. In the case of estates which suffered large shrinkages in value during the year subsequent to death, this gave rise to substantial hardship.[6] Congress undertook to relieve this hardship by Section 202 (a) of the Revenue Act of 1935, giving the executor the option to have the property valued *as of* the date one year after death. Great care was taken to make clear that the option related only to the *time* of valuation. The property to be valued remained the same, whichever date was selected. The basic provisions, now found in Internal Revenue Code, Section 811 (j) are as follows:

> (j) Optional valuation. If the executor so elects upon his return (if filed within the time prescribed by

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[4] Section 812 of the Internal Revenue Code provides that

> "For the purpose of the tax the value of the net estate shall be determined, in the case of a citizen or resident of the United States, by deducting from the value of the gross estate—" certain deductions.

Section 811 provides in part as follows:

> "The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—(a) Decedent's interest. To the extent of *the interest* therein of the decedent at the *time of his death;*" (italics ours)

There then follow further subsections, (b) to (i) inclusive, dealing with dower or curtesy interests, transfers in contemplation of or taking effect at death, revocable transfers, and other like matters, of which it may be at the moment sufficient to say that the words, "existing at the time of the decedent's death," appear in subsection (b), relating to dower or curtesy interests, and that other references to the date of death, as the time for the ascertainment of the taxable estate, occur repeatedly throughout. (The entire Section 811 appears in the Appendix, pp. 40-44)

[5] See note 4, *supra*.

[6] See Point II of this brief, p. 14.

law or prescribed by the Commissioner in pursuance of law), the value of the gross estate shall be determined by valuing *all the property included therein on the date of the decedent's death* as of the date one year after the decedent's death, except that (1) *property included in the gross estate on the date of death* and, within one year after the decedent's death, distributed by the executor (or, in the case of property included in the gross estate under subsection (c), (d), or (f) of this section, distributed by the trustee under the instrument of transfer), or sold, exchanged, or otherwise disposed of, shall be included at its value as of the time of such distribution, sale, exchange, or other disposition, whichever first occurs, instead of its value as of the date one year after the decedent's death, and (2) any interest or estate which is affected by mere lapse of time shall be included at its value as of the time of death (instead of the later date) with adjustment for any difference in its value as of the later date not due to mere lapse of time. (Italics ours)

Of these provisions, three features are obvious:

(1) No stronger words, to exclude by implication future receipts in the nature of ordinary income, could have been selected than the clear and unambiguous statement that "all the property included therein *on the date of the decedent's death,*" may be valued "*as of*" the date one year later. (Italics ours)

(2) No express words, to include future receipts in the nature of ordinary income, are contained in this section, although the insertion of such words would have been the obvious and simple method of reaching that result, had Congress so desired. *United States* v. *Field,* 255 U. S. 257, 264.

(3) No words can be found in this section, requiring that any receipts subsequent to death be reflected in the valuation. Even in the case of "*property included in the gross estate on the date of death* and, within one year after the decedent's death * * * *sold, exchanged or otherwise disposed of,*" the price of the property is not included, but rather the property is "included at its *value* as of the time

of such * * * sale, exchange, or other disposition, whichever first occurs, instead of its value as of the date one year after the decedent's death." (Italics ours)

Notwithstanding the fundamental distinction between capital and income which is characteristic of the estate tax and income tax laws (see *Bull* v. *United States,* 295 U. S. 247, 256), Section 811 (j) makes no reference to including or valuing ordinary income received after death (as distinguished from increases in value of the capital asset, which are, of course, reflected in the optional valuation because that is the necessary effect of the express provisions).

2. *Ordinary income arises by severance and is not the substituted proceeds of the underlying property.*—Giving the words of Section 811 (j) their "plain popular meaning,"[7] they do not afford even a fragmentary ground for including, in the thing to be valued one year after the date of death, ordinary income derived since the date of death and having no separate existence at the date of death. To the general understanding, the distinction between the property and the income derived from the property is perfectly clear—between the tree and its fruit; between the mare and her colt; between the title to the land and the rent; between the share of stock and the dividend; between the debt and the interest. See *Helvering* v. *Horst,* U. S. Sup. Ct., decided November 25, 1940, 85 L. ed. 99.

When these items of income are received they do not, to the ordinary mind, stand in substitution for the underlying property. They arise by severance, take on an independent existence, and leave the underlying property intact.

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[7] *United States* v. *Kirby Lumber Co.,* 284 U. S. 1, 3. This Court has recently said that in the interpretation of tax statutes words should be "given their commonly accepted import. 'Congress may well be supposed to have used language in accordance with the common understanding.'" *United States* v. *Wurts,* 303 U. S. 414, 417. See also *Helvering* v. *San Joaquin Co.,* 297 U. S. 496, 499. *Old Colony R. Co.* v. *Commissioner,* 284 U. S. 552, 560. *Woolford Realty Co.* v. *Rose,* 286 U. S. 319, 329. *Avery* v. *Commissioner,* 292 U. S. 210, 214.

Naturally there is no difficulty about recognizing, as part of a man's estate at his death, those income items which by the date of death have acquired a separate existence by severance. But, at the other extreme, that the fruit not yet in bud, the colt not yet conceived, the rent for a period occupation of which has not yet been enjoyed, the dividends not yet declared, and the interest not yet earned—that these are in existence at the date of death and form part of a man's estate is a proposition far removed from the ordinary processes of thought and from economic realities.

Likewise, the ordinary mind has no difficulty in grasping that increases in the value of the underlying property, whether realized upon disposition or unrealized but reflected in present market value for the purposes of appraisal, are in and of the underlying property itself. To this, the express provisions of Section 811 (j) give full effect, thus rendering more emphatic the absence of any provision for the inclusion of the ordinary income.

The distinction is made even more sharp when we refer to the express provision that property "*included in the gross estate on the date of death*" and within the year "*sold, exchanged, or otherwise disposed of,*" shall be included at its value as of the time of such sale, exchange or other disposition. These are the only words of the section which deal with receipts subsequent to death. But it is a fantastic stretch of ordinary language to say that a sale, exchange or other disposition takes place when the fruit ripens and is picked, the colt is born, the rent is paid on the rental date in arrears, the dividend is declared and paid, or the interest is earned and paid.

3. *The Commissioner's regulation substitutes an attenuated subtlety for the obvious and rational meaning of the words of the statute.*—Article 11, of Regulations 80 purports to require the inclusion of such ordinary income items if the optional valuation is used. This regulation came, and remains, as a source of amazement to the Bar. It is

given in full in the Appendix, pp. 44-52, and is further criticised in connection with the opinion below, at pages 20-29 *et seq.* To justify the result just stated, the regulation, in a lengthy dissertation, undertakes to break up the general property existing at death into little parcels of rights[8] and to find, whenever income is realized pursuant to such a right, that such income stands in substitution for such right and hence constructively was part of the gross estate at the decedent's death.

The fallacy of this is apparent. The income does not stand, in any commonly accepted sense, as the *substituted* proceeds of any right which inhered in the general property. It is not like the collection of the debt, which is then paid, nor like the sale of the horse, which is then gone. On the contrary, the basic right inhering in the general property (to receive any and all crops, increase, rent, dividends declared, or interest as the payment for the use of money) is neither exhausted nor diminished as the increments which constitute income are severed and received. It exists as fully a year later as at the date of death.

Of course the income-producing potentialities of property affect its value at any particular time, and if the date for the realization of an installment of income is near at hand, this will have its specific effect. Thus, when the colt has been conceived, or the crop is ripening, or the dividend date is near, or the interest has been partly earned, the mare, land, stock or bond may sell for more.[9] But note that

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[8] A "dual nature," per Goddard, J., in *Saks* v. *Higgins*, 29 F. Supp. 996, 999 (S. D. N. Y.). And note that this is just the sort of barren refinement, out of the property law, which this Court has refused to apply, preferring to give to tax legislation a simple and realistic interpretation. *Helvering* v. *Hallock*, 309 U. S. 106.

[9] The inclusion of "accrued interest" as an item in the estate, is really but an example of this principle, merely conforming to the practice of the market in expressing in that way this current factor in the valuation of the bond. Obviously, there would be no accrual of interest upon a defaulted bond. On the other hand, the inclu-

at the option date, one year from death, a like factor of valuation will presumably exist, corresponding to the similar factor as it existed at the date of death. If it does, there is then no justice in drawing into the gross estate the income derived in the meantime. If it does not exist, this will in all likelihood have been because of just the sort of changed conditions against which the option was intended to relieve.

With respect to this regulation, one quotation from a decision of this Court is pertinent here, for it comes from the class of cases cited above, dealing with the attributing of ordinary meaning to words.

> As was said in *Lynch* v. *Alworth-Stephens* Co., 267 U. S. 364, 370, "the plain, obvious and rational meaning of a statute, is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover".
>
> *Old Colony R. Co.* v. *Commissioner*, 284 U. S. 552, 560.

In the subsequent portions of this brief we shall endeavor to canvass all the possibilities of argument, but in the end, this case is very simple. It is this:—Would any ordinary man, when told that "all the property" present at a certain time is to be valued "as of" a later date, think that such value would include the income derived in the meantime from the property? We say "No." And this result would not be changed merely by pointing out to him something which he had already taken wholly for granted, namely, that the receipt of the income flows from rights inherent in the ownership of the property and from arrangements already made to develop its productivity.

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sion in the estate of a dividend having a record date before the date of death is an entirely different matter. Here the severance has actually occurred, even if payment has not been made, and there is a separate item.

II.

The Legislative History of the Statute Clearly Negatives the Existence of Any Congressional Intent to Require Inclusion of Interim Income in Valuing the Property to be Included in the Gross Estate.

We do not see how it can be said that the statute is ambiguous. The regulation purports to resolve an ambiguity, but it might be easier to say that it sets up the ambiguity as a man of straw. However, if it be assumed that the statute is ambiguous, its legislative history clearly negatives the view that Congress intended to exact the inclusion of the interim income as the price of the option to use the later valuation date.

The first proposal for relief made in connection with an increase in estate taxes, was for a "deduction", from the value at death, of the "net shrinkage in value" occurring during the first year after death. This proposal was explained as follows:

> The existing estate tax law is amended by a provision permitting the deduction of the shrinkage in value which may occur between the date of death and a date 1 year after death. * * * This provision is equitable in its effects and will prevent in practically all cases the danger of complete confiscation of estates due to a sudden decline in market values.[10]

A similar explanation was given on the floor of the Senate.[11] The amendment was adopted by the Senate on August 15, 1935, and described the deduction as:

> "The net shrinkage in value of assets arising solely from the difference in the aggregate value of assets forming part of the decedent's gross estate on the date of death and the aggregate value of *such assets* 1 year after the decedent's death * * *.'"[12] (Italics ours)

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[10] H. R. 8974, Sec. 202, as reported to the Senate; Sen. Report No. 1240, 74th Congress, 1st Session, p. 9.

[11] 79 Cong. Rec., pt. 12, pp. 13,043-13,044.

[12] 79 Cong. Rec., pt. 12, p. 13226.

Apparently the form of this proposal was not acceptable, for the report of the committee of conference substituted in place of it the present provision for an optional valuation.[13] The accompanying statement of the managers on the part of the House (printed with the report) explained that in lieu of the "deduction"—

> the conference action inserts a provision giving the executor an election *with respect to the time* as of which the property included in the gross estate is to be valued. Under existing law the valuation is made as of the date of death. If the executor exercises the election given him by the conference agreement, all the property included in the estate on the date of death is to be valued as of the date 1 year after the decedent's death, except that the value (at the time of distribution, sale, exchange, or other disposition) of property distributed, sold, exchanged, or otherwise disposed of, is taken in lieu of its value as of 1 year after death.[13] (Italics ours)

Immediately following the words last quoted, the House Managers gave a specimen computation showing "the operation of this new provision giving the executor an election". This example, by reason of its length, is set out in the Appendix, p. 52, and its present significance lies in the fact that in it the authors of the legislation placed on record their own illustration of the workings of the optional value, in which, notwithstanding that securities of a type normally income-bearing were assumed to exist, no item of interim income was included in the specimen net estate.

The specific indications of the Congressional intent to be drawn from this history may be summarized as follows:

1. The substitution of the optional valuation provision in place of a proposed "deduction" of the "net shrinkage in value" shows a positive trend away from a formula ("net shrinkage") in which the interim income could more easily have been reflected.

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[13] H. Rep't No. 1885, 74th Congress, 1st Session, pp. 4-5, 10-11.

2. The giving of the specimen computation, with no mention of items of interim income, shows that no such inclusion was actually intended, for such a qualification of the relief intended to be afforded was far too fundamental to have been merely overlooked, particularly since there was no express provision and inclusion could have arisen only by construction.

3. Even the proposal for the deduction of the "net shrinkage" was referable, as the above quotation shows, to the difference between the aggregate value of the assets which were in the estate at the date of death and the aggregate value of "such assets" one year later.

4. The express reference in the optional valuation provision to valuing "all the property included in the estate on the date of death" is even stronger than the previous reference to the valuation of "such assets".

Thus the legislative history of the statute not only gives no aid to the construction for which the Commissioner contends, but affirmatively shows, by every inference capable of being drawn, that that construction was not intended.

III.

The Commissioner's Regulation Violates the Concepts of Capital and Income Which Underlie the Federal Estate Tax and Income Tax Laws.

It is not our purpose here to embark upon a discussion of "double taxation," to contend that double taxation is unconstitutional or even that it is to be avoided. (See, however, *United States* v. *Supplee-Biddle Co.*, 265 U. S. 189, 194-196; *Bull* v. *United States*, 295 U. S. 247, 255-257, and the discussion of this subject in the opinion in *Clark* v. *United States*, 33 F. Supp. 216, dealing with the present issue.) It is, however, true that in dealing with the estate tax law and the income tax law, which form part of a single system of taxation, the same concepts of capital and income should be maintained.

And, where dividends are concerned, it should be borne in mind that we are not now talking about the distinction between the capital and earnings of the corporation. We are speaking of the stockholder's capital and asking what is the property which the stockholder owns at his death.

The present issue is whether items of ordinary income, received after the date of death, are in any proper sense *a part* of *"the property included"* in the gross estate on the date of death. On this point, with respect to dividends at least, the decision in *Lynch* v. *Hornby*, 247 U. S. 339, should be conclusive.

In that case the questions were, first, whether under the Income Tax Act of October 3, 1913 a tax was laid upon corporate dividends, declared and paid in 1914, extraordinary in amount and to a large degree derived from surplus accumulated prior to March 1, 1913; and second, whether, if so construed, the Act would be constitutional as applied to the portion of the dividends derived from such previously accumulated surplus. The Court answered both questions in the affirmative, and in the course of doing so described the situation of the taxpayer as follows (p. 341):

> He was but one of many stockholders, and had but the ordinary stockholder's interest in the capital and surplus of the company; that is, a right to have them devoted to the proper business of the corporation and to receive from the current earnings or accumulated surplus such dividends as the directors, in their discretion, might declare. *Gibbons* v. *Mahon*, 136 U. S. 549, 557.

With respect to the power of Congress to tax the entire dividend as income, notwithstanding that part of it was derived from surplus accumulated before March 1, 1913, the Court said (247 U. S. 343-344, 346):

> And we deem it equally clear that Congress was at liberty under the Amendment to tax as income, without apportionment, everything that became income, in the

ordinary sense of the word, after the adoption of the Amendment, including dividends received in the ordinary course by a stockholder from a corporation, even though they were extraordinary in amount and might appear upon analysis to be a mere realization in possession of an inchoate and contingent interest that the stockholder had in a surplus of corporate assets previously existing. *Dividends are the appropriate fruit of stock ownership, are commonly reckoned as income, and are expended as such by the stockholder without regard to whether they are declared from the most recent earnings, or from a surplus accumulated from the earnings of the past, or are based upon the increased value of the property of the corporation.* The stockholder is, in the ordinary case, a different entity from the corporation, and Congress was at liberty to treat the dividends as coming to him ab extra, and as constituting a part of his income when they came to hand. (Italics ours)

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We do not overlook the fact that every dividend distribution diminishes by just so much the assets of the corporation, and in a theoretical sense reduces the intrinsic value of the stock. But, at the same time, it demonstrates the capacity of the corporation to pay dividends, holds out a promise of further dividends in the future, and quite probably increases the market value of the shares. In our opinion, Congress laid hold of dividends paid in the ordinary course as de facto income of the stockholder, without regard to the ultimate effect upon the corporation resulting from their payment.

The present case, as to dividends at least, is the exact converse of *Lynch* v. *Hornby*. The concepts of capital and income are correctly delimited in that case; and dividends should now be treated as received, not as the *substituted* proceeds of a right inhering in the stockholder's underlying property, but as the fruit, the offshoot which derives a separate existence by severance, leaving the right intact.

Although, by subsequent legislation, dividends out of earnings or profits accumulated before March 1, 1913 have been eliminated from taxable income, dividends are still taxed as income, notwithstanding that they are paid out of earnings accumulated prior to the beginning of the taxable year in which the dividend is paid. See, Internal Revenue Code, § 115 (a), (b). Thus the fundamental concept of *Lynch* v. *Hornby* remains unchanged and it is submitted that it should be carried out in the estate tax law, as in the income tax law, thus giving the words used by Congress their ordinary and natural meaning. It follows that a dividend due and paid after death is no part of "the property included" in the gross estate at death.[15]

Another case which illustrates the importance of maintaining a clear distinction between the concepts of capital and income, as reflected in the estate tax and income tax laws, is that of *Bull* v. *United States*, 295 U. S. 247. It was there held that the Government was not entitled to treat as a part of the gross estate profits received by the estate from a partnership in which the decedent had been a member under an agreement which gave the estate the right to a share of the partnership profits made during the year immediately following the decedent's death. The Commissioner claimed to be entitled to include these profits both in the gross estate for estate tax purposes and in the taxable income of the estate for income tax purposes. The profits were held correctly included in the taxable income, but incorrectly included in the gross estate.

The decision was based upon two grounds. First, that in the estate tax levy the identical money, which was made the subject of the income tax, was made the direct basis of

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[14] Cf. *Irwin* v. *Gavit*, 268 U. S. 161, 167-168.
Eisner v. *Macomber*, 252 U. S. 189, 206-207.
United States v. *Safety Car Heating Co.*, 297 U. S. 88, 99.

[15] See *Sharp* v. *Commissioner*, 91 F. (2d) 802 (C. C. A. 3) reversed on another point, 303 U. S. 624.

the tax, being treated as having the quality of capital or corpus and not being viewed merely as a measure of the valuation of a right passing from the decedent at death. Second, that there was no justification for characterizing the right of a living partner as his capital, and that if it was not capital to him it was not capital to his estate.

Without endeavoring to apply the decision in *Bull* v. *United States* by direct analogy to the present case, it furnishes strong assurance that the relationship between the estate tax law and the income tax law, in what is essentially a single system of taxation, calls for the enforcement of uniform and properly related concepts of capital and income.

IV.

Critique of the Opinion Below and of the Regulation.

Inasmuch as a critical discussion of the majority opinion below will directly tend to develop the arguments already advanced as well as those to be advanced hereinafter, it seems proper to take up such a discussion at this point.

We take it that, whatever else may be said of it, the opinion of the able and distinguished Judge who wrote the majority opinion for the Circuit Court of Appeals of the Second Circuit, found at 111 F. (2d) 78-80 (R. 31-38) may be deemed to embody as good an argument as can be made for the Government's case. With respect to this argument, the following comments may be made.

1. *The decision ignores relevant principles of construction.*—No recognition is given by the opinion to the rule for taking words of a tax statute in their plain popular meaning; to the rule of resolving all reasonable doubts in the taxpayer's favor; to the rule of giving to a remedial statute a liberal interpretation; to the limitations upon the power of the Commissioner to legislate through regulation, or to the limitations upon the right of the court to legislate through decision. No deference is paid to the fact that the words of

the statute, taken in their plain ordinary meaning, are fully capable of a simple interpretation, favorable to the taxpayer, which requires no refined analysis of property rights to sustain. Having made the assumption that the statute "is open to fair differences of construction", the only rule invoked for resolving those differences is that "an administrative interpretation is often highly persuasive" (111 F. (2d) 79, R. 33). The decision, therefore, leaps over and in no wise meets much of the argument which we present in this brief.

2. *The strained and artificial nature of the opinion is a confession of weakness.*—The structure of the opinion is almost a confession of weakness. Taking up first the case of the interest bearing bond, as providing (presumably because of the frequent use of detachable coupons) the one plausible illustration of a bundle of "separate obligations," and treating rent as analogous, the court proceeds to say that "for these reasons we think that as to all transactions of this kind it was permissible to read the word 'property,' in §202 (a) distributively; that is, as referring to an aggregate of obligations which changes with time." (idem p. 79, R. 33). Having done this, the court proceeds to admit that dividends might well fall in a different category (idem p. 79, R. 33), but decides that they should, nevertheless, be treated like the interest and the rents (idem, pp. 79-80, R. 33-34).

For this conclusion the court gives as its first reason that the stockholders are collectively the beneficial owners of earnings, as of the other corporate assets, and that unless the regulation is sustained some earnings, accumulated before the date of death, might, in the guise of dividends, slip out from beneath the estate tax (idem p. 80, R. 34). This argument, in addition to assuming that the ambiguity, if any, should not be resolved in the taxpayer's favor, contradicts the fundamental principles of *Lynch* v. *Hornby, supra.*

Next the court argues in favor of a uniform application of the statute (a uniformity led up to by its prior erroneous conclusions as to interest and rents) and proceeds on

this ground to include the dividends. The court admits that it is hard to see how all kinds of income could be reached, such as crops or offspring of livestock, but limits the need of uniformity to "income from investments" (111 F. (2d) 80, R. 34). This is a curious argument which says in substance that it is necessary to have uniformity but that, since there clearly cannot be uniformity as to *all* income, then there should be uniformity merely as to *certain kinds* of income, if for these kinds of income a common descriptive phrase can be found. How far afield this gets from any intent that can be deduced from the words of the statute!

Lastly, the court argues about the purpose of Congress and deduces, not the purpose indicated by the words of the statute when given their plain and ordinary meaning, but a purpose impliedly limiting the relief to be afforded. The option is said to be one between "accessible" and "inaccessible" values, of which "accessible values," income is to be treated as a part (idem p. 80, R. 35). This lifts itself by its own bootstrap. Congress said nothing about "accessible values." The statute merely refers to the values, as of one year from death, of the property *in the estate at death;* and if the interim income is, in a proper contemplation of the estate tax law, no part of that property, then it cannot be made a part simply by discovering that it is "accessible." It was "accessible" before, when only the value at the date of death was used, but no one claimed it was part of the property composing the gross estate at death.

The opinion says that,

> If they are not to be assessed upon what is practically beyond their reach, they should certainly be compelled to accept in its stead the total of what is practically within it. (idem p. 80, R. 35).

If the spirit of this language does not demonstrate a purpose on the part of the court to read its own views into the statute, regardless of whether they may be discoverable in the statute, it would be hard to find a judicial expression which does so.

3. *Even in dealing with interest and rent the opinion substitutes technicalities for actualities.*—Returning to the interest and rent, upon which cornerstone the whole artificial fabric of this opinion is built, we would point out that people do not commonly think of the coupon bond in terms of "a series of promises to pay installments of money in the future," part of which "we call interest" and the rest of which "we call principal" (idem p. 79, R. 32). Granting the complete assignability of the future installments of interest, there are still basically but two kinds of rights, the right to principal and the right to interest *thereon.* This Court has said that the holder of a coupon bond owns "*two* independent and separable *kinds of right* * * * Together they are an obligation to pay principal and interest * * *" (Italics ours). *Helvering* v. *Horst,* U. S. Sup. Ct., decided Nov. 25, 1940, 85 L. ed. 99, 100-101. The essence of the bond is the acknowledgment of the loan and the agreement to repay it with interest—"the right to demand and receive at maturity the principal amount of the bond representing capital investment . . . the right to demand and receive interim payments of interest on the investment in the amounts and on the dates specified by the coupons." (*Helvering* v. *Horst, supra*) This is very different from the lower court's view of the bond as embodying a great number of rights, all (whether called principal or interest) of essentially the same nature.

Having in mind the words of the circuit court of appeals, we examined coupon bonds issued by seven different corporations and found that in each instance the body of the bond contained the general promise to pay interest upon the surrender of the coupon and that each coupon recited a number of dollars, to be paid upon its surrender, "*being interest*" at the stated rate for a particular period. To say that these are "separate obligations" which "for convenience we group * * * together as a single piece of property, and they pass from hand to hand as such" (111 F. (2d) 79) wholly inverts the principle ~~for~~ or convenience. To the ordinary man, the provision made for the repayment of the loan

and for the compensation for use of the money are a single agreement, and it is "for convenience" that separate coupons are provided to the end that the corporation may pay each installment of interest when due without the necessity of obtaining proof as to the ownership at each interest date, of all of its bonds outstanding (See *Kenosha* v. *Lamson*, 9 Wall. 477, 482, 483-484). If the coupon bond is exchanged for a registered bond, doubtless this separability disappears (Cf. *Shaffer* v. *Federal Cement Co.*, 225 Fed. 893, 896-897).

The opinion uses this remarkable language, with respect to interest:

> and although to the lender the payments may appear to be the produce of his principal, it is not so; he gets it not because anything comes out of the money lent, but merely because a future dollar payable by another is less desirable than a present dollar in hand. (idem p. 79, R. 33.)

If this be anything, it is an argument that interest is not income. However, in the next sentence, the court says:

> His right to interest dates from the beginning. (idem p. 79, R. 33.)

Thus recognition is given, doubtless unintentionally, to the fact that the basic right to interest, *i. e.*, compensation for the use of money, is a continuing right and, as we have said, (p. 10, *supra*) the right itself remains unaffected as the payments are earned and are made.

In principle, the reasoning of the circuit court of appeals is opposed to the reasoning upon which this Court rested its decision in *Helvering* v. *Horst*, decided November 25, 1940, 85 L. ed. 99, where it was held that the assignor of a coupon remained taxable upon the interest as income, although the coupon was actually collected by the assignee. it was there said that—

> the import of the statute is that the fruit is not to be attributed to a different tree from that on which it grew. (85 L. ed. 99, 103.)

and that—

> to say that one who has made a gift thus derived from interest * * * paid to his donee has never enjoyed or realized the fruits of his investment * * * is to affront common understanding and to deny the facts of common experience. (85 L. ed. 99, 102.)

This should be sufficient to dispose of the present case adversely to the government, for it places the emphasis correctly upon the quality of the coupon as interest—the fruit growing upon the tree of the capital investment. In the present case the court below strained every effort to attribute to the interest a quality similar to that of the capital investment itself, and in so doing it erred.

With respect to rent, the opinion below states that—

> Since the series does not include any promise to pay principal, a lease is even more plainly a wasting piece of property. (111 F. (2d) 79, R. 33.)

Inasmuch as this assertion ignores the underlying property in the land, the right of the owner to have the land surrendered at the end of the lease, and the circumstance that the lease is merely a writing embodying the obligation to pay for the use of the land which rests in turn upon the land itself, we find it hard to say anything with respect to it except that it is a refinement upon a refinement, which does gross violence to the cardinal rules of statutory construction.

Both the opinion and the regulation follow the same pattern. Each takes the interest bearing bond first, because it affords the only plausible leverage for the argument. Having brought in the interest bearing bond by the use of concepts of property which are at least "unusual" (per Chase, J., dissenting)[16], each then proceeds to reach out and

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[16] The quotation, more at length, is as follows (*Saks v. Higgins*, 111 F. (2d) 78, 81 (R. 37)):

> "I do not suggest that such concepts of property are impossible but only that they are so unusual that they are too

drag in other kinds of income of types more and more difficult to bring within the scope even of the argument about the interest bearing bond. The opinion trails off to obscurity and the regulation is mute with respect to the case of the crops and the offspring of livestock. And yet this is all done in the name of uniformity and of sweet reasonableness.

4. *The treatment of the interest-bearing bond is contrary to the express language of the optional valuation statute.*— If, contrary to everything that we have said above, there be accepted the theory that the interest bearing bond can be veiewed as an aggregate of separate and distinct property rights which may be valued separately, the result of the decision is in direct contravention of the language of the statute itself, which provides (Internal Revenue Code, Sec. 811 (j)):

> Any interest or estate which is affected by mere lapse of time shall be included at its value as of the time of death (instead of the later date) with adjustment for any difference in its value as of the later date not due to mere lapse of time.

A simple illustration will demonstrate this. Let it be assumed that at the date of death the decedent owned a coupon bond paying 4 per cent interest annually and having just under two years to run to maturity, hence bearing two

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much to load upon the language of this statute. To make them even approach the realm of practical economic reality in which taxation is to be kept * * * one would have to believe that it was both feasible and customary in a business sense to purchase and sell the so-called property consisting of the right to receive in the future unearned interest or income from intangibles as something separate and distinct from the ownership of the intangibles themselves. And, what is of even greater significance, it would also be necessary to believe that Congress meant to legislate on such a basis, rather than to say in simple words that, if the option offered was exercised, the estate income received by the executor during the year must be treated as though he had sold or otherwise disposed of property of a value equal to the amount of income received."

coupons. This bond is assumed to have a market value of $1000 at date of death. If we have here three pieces of property (the principal obligation and the two coupons) worth together $1000, the value of each piece must be something less. As the annual interest date falls just short of the date one year from death, then at the date of death the first coupon (discounted a own rate) is worth about $38.40, the second coupon is w th about $36.80, and the principal obligation of the bond is worth about $924.80. These sums add up to the $1,000.

A year later the first coupon has just been cashed for $40.00. Assuming that the market has not changed, the remaining coupon and the bond are then worth together $1,000, the remaining coupon being valued at about $38.40 and the principal obligation of the bond at $961.60. Thus, one year from the date of death, the three pieces of property (including the proceeds of the coupon just cashed) are worth $1,040. The only explanation of this increase in value is that one year has elapsed, reducing the extent to which the value of the pieces can properly be discounted.[17] Yet this is just the thing which the language quoted above has forbidden to be taken into account in making optional valuations.

It will be noted that the increase in value of the three pieces, due to the lapse of time, totals $40.00. The coupon collected just before the end of the year brought in $40.00. Thus the interim income and the increase of value in the three pieces, due to the lapse of time, are identical. Manifestly the short course of arriving at the correct result of the statute is to exclude the collected coupon from the valuation and simply take the market value of the bond at the date one year from death.

In the Commissioner's Regulation, a patent is given as one illustration of "properties, interests or estates which

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[17] Compare the language of the court below: "* * * merely because a future dollar payable by another is less desirable than a present dollar in hand. * * * an aggregate of obligations that change with time * * *" Per L. Hand, J. at 111 Fed. (2d) 79.

are affected by mere lapse of time" (see Appendix p. 48). In the assumed illustration, a patent, valued at $100,000 at the date of death, having been sold for $65,000 six months after the date of death, $5,000 is added back to the price to make "the adjusted value of the patent," on the ground that the patent, being assumed to have had ten years to run, lost 5 per cent of its value at the date of death during the six months between the date of death and the date of sale. Let us suppose that under this patent royalties were derived during the six months between the date of death and the date of sale. The Commissioner, with his point of view towards the interim income, would include these royalties in the taxable estate.[18] But is it not obvious that the royalties represent the benefit to the owner of the patent derived during this fraction of its expiring life, and that if the $5,000 is also included there will be a clear duplication—not "double taxation" but inclusion, in the base to which a single tax is to be applied, of the same property twice?

In the light of these illustrations, and doubtless others could be suggested, the case of the interest bearing bond, which is the fulcrum upon which all the leverage of the opinion of the Circuit Court of Appeals is brought to bear, exhibits a clear violation of the language of the statute. What then can be left of the claim that to secure uniformity other types of interim income should be drawn into the scope of an artificial generalization about "Investment" income?

5. *Finally, various inequities and difficulties necessarily flow from the attempted inclusion of the interim income.*— The mere existence of these inequities and practical difficulties furnishes the strongest evidence that such inclusion was not intended by Congress. The opinion does not advert to these in any way, and neither does the regulation. Apparently they were not even foreseen by the Commissioner.

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[18] See Regulation, Appendix, p. 46. And there would, on the Commissioner's construction, be no authority, at least in any express statutory provision, for deducting amortization of the patent. See further, as to this, pp. 30-31, *infra*.

They are so important that we discuss them under a separate heading directly below.

V.

Inequities and Difficulties Necessarily Flowing From the Attempt to Include the Interim Income Furnish Strong Evidence That Such Inclusion was Never Intended by Congress.

We do not, of course, contend that it would be beyond the power of Congress to provide expressly for the inclusion of the interim income, even though inequities and difficulties might result. But, resulting inequities and difficulties prove, for two reasons, that Congress never intended to bring about such inclusion by implication.

(a) It is inconsistent with the spirit of a statute intended to afford relief to accord to it a construction which gives rise to new hardships and to a multitude of problems not theretofore existing.

(b) When a construction of a law leads to inequities and to a multitude of problems of a nature which in tax legislation are customarily anticipated and provided for, and there appears in the statute nothing to indicate that such problems were even thought to exist, strong proof is given that the construction itself was never intended.

We will take up first practical problems and thereafter make mention of new inequities to which the proposed construction gives rise.

1. *The practical difficulties:*—

Since the whole claim for the inclusion of the interim income is based upon a refined construction given to general language, the statute, of course, gives no clue to the manner in which the supposed separate "right" is to be valued. With respect to this, the learned District Judge who decided *Clark* v. *United States*, 33 F. Supp. 216, said, at page 221-222:

There are additional considerations which make strongly against the interpretation of the statute put forward by the regulation. If it had been intended to include accruing income it seems highly probable that the statute would have expressly said so, as the thought is one that would very naturally have occurred to the draftsman of the language. And if this had been the thought it seems highly probable that some positive provision would have been made for the deduction from the gross income of expenditures to create it, which are a quite customary incident of property other than stocks and bonds and may even occur with them in exceptional cases. It could hardly have been the intention to include in the valuation gross as distinguished from net income, and the absence of any provision for deductions from gross income to establish net seems to be a strong indication that the statute did not intend to include income in the valuation.

Manifestly, gross income is not a proper measure of the value of the "right." Furthermore, if the "right" be valued by including the gross income, injustice is done, both absolutely, since only what is left after the expense of creating the income can possibly represent the value, and also relatively, since there would be discrimination between estates receiving their income from dividends and interest, which usually have slight expense of creation, and estates receiving rentals, the expense of creating which may be very large. Moreover, if it is not gross income that is to be included, no guide is afforded as to what deductions shall be allowed, and the law is left in much the same position as if the Federal income tax law merely mentioned a set of rates and directed that the same be applied to the taxpayer's "net income," without further definition or guidance.

Neither is there any guide as to what kinds of income may be included. The regulation, in providing for the inclusion of rents where there was a lease in force at the date of death, seems to imply that there might be no inclusion of rent flowing from a lease made by the executors. And yet, from the point of view of "accessibility" at least, one rent is as good as the other. A further problem might be thought to arise

in connection with the receipt of dividends proved to have been paid out of earnings of the corporation subsequent to the date of death.

In the regulation, the Commissioner departs as a practical matter from his refined theory of valuing the "right" and directs that in connection with each item of property there shall be separately included and valued, as of the date of payment, each item of income collected. Apparently, he views these items as includible in gross, for the regulation gives no recognition to, and makes no provision for, any factor of expense involved in creating or collecting the income, although in the case of real property, for example, such expenses may be extremely large, including local taxes, mortgage interest, management and brokerage fees, maintenance, repairs and other items.

As such items of expense are not deductible from the gross estate under any express provision of law, either as debts, expenses of administration or otherwise, the result is to measure the tax by an excessive value which is nowhere else compensated for. In taking this approach, the Commissioner seems to admit the unsoundness of his position, for he appears driven by the want of any standard in the law for ascertaining the *net* value of the supposed "rights", to adopt the manifestly unjust alternative of seizing upon the *gross* income as the basis of the tax.

The difficulties, moreover, are not limited to the ascertainment of what items of income are to be included, or to whether they shall come in gross or after some deductions; they extend even to the ascertainment of the existence of any income. In any case, for example, in which the decedent in his lifetime has made a transfer of property in contemplation of death or intended to take effect in possession or enjoyment at or after death, the regulation would seem to require the ascertainment, constructively if necessary, of the income to be attributed to that property during the year following the date of death. It is difficult enough, when the property may have been sold, converted or altered,

to bring the property itself down to the date of death, hypothetically, for the purposes of a current valuation. But when, on top of that, it becomes necessary to consider what income would have been received from such constructively present property, the inquiry seems far fetched indeed.

When there is considered the elaborate and detailed character of present day taxing statutes, and the pains taken in their drafting to anticipate problems and difficulties, it is utterly unreasonable to believe that Congress intended a construction of the optional valuation statute which burdens the relief with a multitude of new problems without providing in advance the slightest key to their solutions.

2. *Inequities:*—

The inequities inherent in the Commissioner's construction of the optional valuation provision are both absolute and relative.

As an example of the absolute sort, we would point out that the Commissioner's construction of the statute is bound to result in an unreasonable and disproportionate diminution of the relief. This is because there is no express provision in the statute which allows the income tax on the interim income to be a deduction from the gross estate when the optional valuation is used. Consequently, when the interim income is included in the gross estate in its entirety, without any deduction of the income tax levied upon that very income, a portion of the estate tax is levied upon monies which for all practical purposes are no part of the estate, in effect an estate tax upon the income tax. When this fact is combined with the higher rates of tax, it is quite possible to have the inclusion of the interim income result in combined estate and income taxes, solely due to this income, equal to or exceeding the income itself, and the same principle operates to some extent in every taxable estate, however small.

Relatively, as between life tenants and remaindermen, the effect may be materially to increase the burden which falls upon the remaindermen by levying the estate tax upon

income which enures to the life tenants. Also, as between residuary legatees under the will and beneficiaries of trusts or other conveyances made by the decedent in his lifetime, the effect is substantially to increase the burden upon those taking under the will although the income in question is not available to them, or even to the estate, for the payment of debts and expenses. As the Federal estate tax law makes no provision for apportionment except for the right of reimbursement from beneficiaries of life insurance, the tendency is to accentuate a hardship against which even the testator, by reason of the trust or conveyance being of long standing, may not have been able to relieve through any provision of his own. (See Karch, The Apportionment of Death Taxes, 54 Harv. L. Rev. 10, 22-28, 34-36).

We do not suggest that these illustrations are exhaustive. But they seem sufficient to demonstrate a clear incompatibility between the effects of the Commissioner's construction and the positive purpose of the statute to afford relief. And we would add at this point that if there is any particular occasion upon which it is inappropriate to attribute to Congress an intent to create or accentuate inequities, it is when positive purpose to afford relief is the single motivation of the law in question.

VI.

The Regulation Violates Every Applicable Rule Governing the Construction of Statutes and Their Interpretation Through Regulations.

All of the difficulties which we have just mentioned, whether of principle or of practical results, are avoided by adhering to elementary rules for the construction of statutes found in the decisions of this Court. We have already mentioned, Point I, *supra*, the rule for according to words their plain popular meaning. Other rules are as follows:

1. *For resolving doubts in the taxpayer's favor—*

"If doubt exists as to the construction of a taxing statute, the doubt should be resolved in favor of the taxpayer." *Hassett* v. *Welch*, 303 U. S. 303, 314.[19] This proposition is deeply imbedded in the decisions of this Court, where in varying language it is found stated with great vigor. No suggestion has ever been offered that it should be overruled. It can be applied to the present issue without hesitation, for here all taxpayers are similarly situated. (Cf. *Burnet* v. *Guggenheim*, 288 U. S. 280, 286)

2. *For construing remedial legislation liberally—*

In a broad sense, Section 202(a) of the Revenue Act of 1935 was remedial legislation. It was intended to relieve against the unfair result of shrinkages in estates. "Manifestly it is to be construed liberally in favor of the taxpayers to give the relief it was intended to provide." *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258, 263. *Burnet* v. *Marston*, 57 F. (2d) 611, 612 (App. D. C.).

It is obvious that the result of the Commissioner's regulation is to restrict the relief given. It is equally obvious that the regulation is founded in the Treasury's desire that the relief should be held to the narrowest scope for which any argument can be made. The character of the regulation demonstrates this upon its face. It is inconsistent both with the general rule of construction in favor of the taxpayer and also the somewhat more specialized and reenforced rule to which we have just adverted.

The privilege granted to the taxpayer by the statute is not an "exemption." It does not favor one taxpayer over another. It does not accord special treatment to any. On the contrary, it is an option, equally available to all, and implying freedom and equality of choice in either branch of

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[19] See also *Gould* v. *Gould*, 245 U. S. 151, 153. *Smietanka* v. *First Trust & Savings Bank*, 257 U. S. 602, 606. *United States* v. *Merriam*, 263 U. S. 179, 187-188. *Crooks* v. *Harrelson*, 282 U .S. 55, 61. *White* v. *Aronson*, 302 U. S. 16, 20.

the option. There is, therefore, no excuse for a strained construction cutting down the relief.

3. *For limiting the weight accorded departmental regulations—*

While it is said that "great weight is attached to the construction consistently given to a statute by the executive department charged with its administration,"[20] it is also true that "administrative practice and treasury rulings * * * cannot narrow the scope of a statute when Congress plainly has intended otherwise." *Neuberger* v. *Commissioner*, U. S. Sup. Ct., decided Nov. 12, 1940, 85 L. ed. 16, 19.

This is because the power "to prescribe rules and regulations * * * is not the power to make law * * * but the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." *Manhattan Co.* v. *Commissioner*, 297 U. S. 129, 134.[21]

Also, while re-enactment of a statute, without substantial change, subsequent to the promulgation of Treasury regulations, may import a legislative approval of such regulations, *Murphy Oil Co.* v. *Burnet*, 287 U. S. 299, 302-303, it remains true that "where the law is plain the subsequent re-enactment of a statute does not constitute adoption of its administrative construction." *Biddle* v. *Commissioner*, 302 U. S. 573, 582.

True, these decisions of this Court do not afford rules of thumb for mechanical application; they need to be applied with discrimination to the circumstances of each particular case.

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[20] *Burnet* v. *Chicago Portrait Co.*, 285 U. S. 1, 16; *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315.

[21] See also *Koshland* v. *Helvering*, 298 U. S. 441, 446-7 ("no power to amend . . . by regulation". id. 447); *Walker* v. *United States*, 83 F. (2d) 103, 106 (C. C. A. 8); *Commissioner of Internal Revenue* v. *Winslow*, 113 F. (2d) 418, 423 (C. C. A. 1).

In the present case these are the circumstances: (1) the statute is plain and unambiguous, and the regulation is not in harmony with it; further, assuming any ambiguity, (2) there has been no significant re-enactment by Congress since the promulgation of the regulation, and (3) the regulation itself has not stood unquestioned for any such length of time as to permit it to have substantial weight.

The Revenue Act of 1935 was enacted August 30, 1935. The only re-enactment of the optional valuation section has been in the Internal Revenue Code, which is, of course, but a codification and not a new declaration of legislative policy. It is entitled "An Act to Consolidate and Codify the Internal Revenue Laws of the United States" and it is expressly stated in Section 4 (a) that the Internal Revenue Title is "intended to include all general laws of the United States and parts of such laws, relating exclusively to internal revenue, in force on the 2d day of January 1939, (1) of a permanent nature, and (2) of a temporary nature if embraced in said Internal Revenue Title." Act of February 10, 1939, c. 2, 53 Stat. 1. It is manifest that such a re-enactment is not in itself an approval of an administrative regulation. See *Helvering* v. *Hallock*, 309 U. S. 106, 120, note 7.

After the enactment of the statute in August 1935, something over a year went by before the new regulation was promulgated on September 25, 1936. XV-2 Cum. Bull. 293. The regulation was denounced by competent commentators,[22] and it has been, so to speak, on trial from the begin-

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[22] The following are mentioned in the decision of *Clark* v. *United States*, 33 F. Supp. 216, at p. 223:

18 Chicago-Kent Law Rev., March 1940, pp. 150, 163; Montgomery, Federal Taxes on Estates, Trusts and Gifts (1938-9 Ed.) p. 230; Hughes Federal Death Taxes (1938 Ed.) p. 310 note; Penna. Bar Ass'n. Quarterly, No. 34, pp. 100, 105; The Magazine "Taxes", March 1939, p. 147.

And in observing these dates it should be recalled that the comments were doubtless written some time before the publication. See also (1940) 40 Col. L. Rev. 1091-1094.

ning. It has not been "generally unchallenged" (*Cf. Norweigian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315).

When it is borne in mind that estate tax returns are filed fifteen months after the date of death and that thereafter substantial time is required for audit, for the presentation of the taxpayer's arguments to the Bureau of Internal Revenue, for the filing, prosecuting and disposing of claims for refund, and for the commencement of court proceedings and the bringing of the same to trial, it is manifest that the present case, which was decided in the United States district court for the southern district of New York on October 27, 1939 (29 F. Supp. 996), has come forward as promptly as might reasonably have been expected for any test of the regulation's validity. Other taxpayers have prosecuted like claims[23] and it is but fair that the regulation should have no greater weight accorded to it today than it was entitled to the day after its promulgation.

Lapse of time required to bring the taxpayer's case to this court's attention, cannot properly be used to impart added weight to the Government's position; and upon the showing which has been made of steady and consistent opposition to this regulation since its pronouncement, the taxpayers of the country are entitled to exactly the same open consideration, regardless of lapse of time, as was

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[23] *Estate of Abendroth* v. *Commissioner*, 114 F. 2d 1017 (C. C. A. 2) cert. granted Nov. 11, 1940, Nos. 510-511; *Clark* v. *United States*, 33 F. Supp. 216 (D. Md.); *Gude, et al., Executors* v. *Commissioner*, BTA Docket No. 97139, Memo Opinion, June 15, 1940, *Estate of Spurr* v. *Commissioner*, BTA Docket No. 99391, Memo Opinion, May 18, 1940, both now pending upon petition for review in the Circuit Court of Appeals for the Fourth Circuit; *Estate of Eaton* v. *Commissioner*, BTA Docket No. 97351, Memo Opinion, May 20, 1940, now pending in the Circuit Court of Appeals for the First Circuit; *Estate of Singer* v. *Commissioner*, BTA Docket No. 97811, Memo Opinion, June 5, 1940, now pending in the Circuit Court of Appeals for the Third Circuit; *Estate of Mayer* v. *Commissioner*, BTA Docket No. 97590, Memo Opinion, July 13, 1940.

accorded to the government in *Higgins* v. *Smith*, 308 U. S. 473. We submit that there has been "no conjunction of long, uniform administrative construction and subsequent re-enactment of an ambiguous statute" (*Helvering* v. *Hallock*, 309 U. S. 106, 120 note 7) and that the regulation is in essence a partisan argument and should be so regarded in considering the proper construction of the statute.

4. *For avoiding the usurpation of legislative functions under the guise of construction.*

Under ordinary canons of construction, as shown above, the language of the statute under discussion does not call for the inclusion of the interim income in the gross estate. Language could easily have been used which would have done so. There is nothing to indicate that the failure to do so was an oversight on the part of Congress.

The Commissioner apparently conceives that the legislation was defective for want of such a provision. But any arguments to the court along that line must, by their very nature, be founded upon considerations essentially of a legislative nature, and they should, for that very reason, be rejected. It is firmly established that the courts should be scrupulous not to usurp the legislative function under the guise of statutory construction.[24]

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[24] "In the Act of 1913, it would have been easy to require a trustee to pay an income tax on income received by him for unborn beneficiaries or for the trust or the estate. But Congress did not do so. In the next act, it did so. We cannot supply the omission in the earlier act." *Smietanka* v. *First Trust & Savings Bank*, 257 U. S. 602, 607.

"Courts have sometimes exercised a high degree of ingenuity in the effort to find justification for wrenching from the words of a statute a meaning which literally they did not bear in order to escape consequences thought to be absurd or to entail great hardship. But an application of the principle so nearly approaches the boundary between the exercise of the judicial power and that of the legislative power as to call rather for great caution and circum-

The current trend in the decisions of this Court emphasizes the impropriety of substituting judicial for legislative judgment as to the wisdom of legislation. See, *West Coast Hotel Co.* v. *Parrish*, 300 U. S. 379, 399; *Helvering* v. *Davis*, 301 U. S. 619, 644. There is even less excuse for injecting judicial views of legislative policy into the construction of a remedial statute, and so amending it under the guise of interpretation, than for being critical of the policy of a statute when it is challenged as conflicting with the supreme law of the land.

CONCLUSION.

It is respectfully submitted that judgment should be reversed, and the cause be remanded to the circuit court of appeals with directions to reverse the judgment of the district court and to enter judgment for the petitioner.

WILBUR C. DAVIDSON,
Counsel for Petitioner.

Of Counsel:
HERBERT H. MAASS,
DAVID J. LEVY,
of New York, N. Y.
MELVILLE F. WESTON,
of Boston, Mass.
December 1940.

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spection in order to avoid usurpation of the latter." *Crooks* v. *Harrelson*, 282 U. S. 55, 60.

"This language adopted by Congress clearly and unambiguously indicates the purpose to tax the entire value of a joint tenancy under circumstances shown by this record. We are without authority to add language to the statute directly contrary to such a clearly expressed purpose." *United States* v. *Jacobs*, 306 U. S. 363, 373.

APPENDIX.

Internal Revenue Code, §811 (derived from Revenue Act of 1926, §302, as amended):

"§ 811. GROSS ESTATE

The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated, except real property situated outside of the United States—

(a) DECEDENT'S INTEREST. To the extent of the interest therein of the decedent at the time of his death;

(b) DOWER OR CURTESY INTERESTS. To the extent of any interest therein of the surviving spouse, existing at the time of the decedent's death as dower, curtesy, or by virtue of a statute creating an estate in lieu of dower or curtesy;

(c) TRANSFERS IN CONTEMPLATION OF, OR TAKING EFFECT AT DEATH. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, or of which he has at any time made a transfer, by trust or otherwise, under which he has retained for his life or for any period not ascertainable without reference to his death or for any period which does not in fact end before his death (1) the possession or enjoyment of, or the right to income from, the property, or (2) the right, either alone or in conjunction with any person, to designate the persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Any transfer of a material part of his property in the nature of a final disposition or distribution thereof, made by the decedent within two years prior to his death without such consideration, shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter;

(d) REVOCABLE TRANSFERS

(1) TRANSFERS AFTER JUNE 22, 1936. To the extent of any interest therein of which the decedent has at any time made a transfer (except in case of a bona-fide sale for an adequate

and full consideration in money or money's worth), by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power (in whatever capacity exercisable) by the decedent alone or by the decedent in conjunction with any other person (without regard to when or from what source the decedent acquired such power), to alter, amend, revoke, or terminate, or where any such power is relinquished in contemplation of decedent's death;

(2) TRANSFERS ON OR PRIOR TO JUNE 22, 1936. To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, where the enjoyment thereof was subject at the date of his death to any change through the exercise of a power, either by the decedent alone or in conjunction with any person, to alter, amend, or revoke, or where the decedent relinquished any such power in contemplation of his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. Except in the case of transfers made after June 22, 1936, no interest of the decedent of which he had made a transfer shall be included in the gross estate under paragraph (1) unless it is includible under this paragraph;

(3) DATE OF EXISTENCE OF POWER. For the purposes of this subsection the power to alter, amend, or revoke, shall be considered to exist on the date of the decedent's death even though the exercise of the power is subject to a precedent giving of notice or even though the alteration, amendment, or revocation takes effect only on the expiration of a stated period after the exercise of the power, whether or not on or before the date of the decedent's death notice has been given or the power has been exercised. In such cases proper adjustment shall be made representing the interests which would have been excluded from the power if the decedent had lived, and for such purpose if the notice has not been given or the power has not been exercised on or before the date of his death, such notice shall be considered to have been given, or the power exercised, on the date of his death.

(4) RELINQUISHMENT OF POWER IN CONTEMPLATION OF DEATH. The relinquishment of any such power, not admitted or shown to have been in contemplation of the decedent's death, made within two years prior to his death without such a consideration and affecting the interest or interests

(whether arising from one or more transfers or the creation of one or more trusts) of any one beneficiary of a value or aggregate value, at the time of such death, in excess of $5,000, then, to the extent of such excess, such relinquishment or relinquishments shall, unless shown to the contrary, be deemed to have been made in contemplation of death within the meaning of this subchapter.

(e) JOINT INTERESTS. To the extent of the interest therein held as joint tenants by the decedent and any other person, or as tenants by the entirety by the decedent and spouse, or deposited, with any person carrying on the banking business, in their joint names and payable to either or the survivor, except such part thereof as may be shown to have originally belonged to such other person and never to have been received or acquired by the latter from the decedent for less than an adequate and full consideration in money or money's worth: *Provided,* That where such property or any part thereof, or part of the consideration with which such property was acquired, is shown to have been at any time acquired by such other person from the decedent for less than an adequate and full consideration in money or money's worth, there shall be excepted only such part of the value of such property as is proportionate to the consideration furnished by such other person: *Provided further,* That where any property has been acquired by gift, bequest, devise, or inheritance, as a tenancy by the entirety by the decedent and spouse, then to the extent of one-half of the value thereof, or, where so acquired by the decedent and any other person as joint tenants and their interests are not otherwise specified or fixed by law, then to the extent of the value of a fractional part to be determined by dividing the value of the property by the number of joint tenants.

(f) PROPERTY PASSING UNDER GENERAL POWER OF APPOINTMENT. To the extent of any property passing under a general power of appointment exercised by the decedent (1) by will, or (2) by deed executed in contemplation of or intended to take effect in possession or enjoyment at or after his death, or (3) by deed under which he has retained for his life or any period not ascertainable without reference to his death or for any period which does not in fact end before his death (A) the possession or enjoyment of, or the right to the income from, the property, or (B) the right, either alone or in conjunction with any person, to designate the

persons who shall possess or enjoy the property or the income therefrom; except in case of a bona fide sale for an adequate and full consideration in money or money's worth; and

(g) PROCEEDS OF LIFE INSURANCE. To the extent of the amount receivable by the executor as insurance under policies taken out by the decedent upon his own life; and to the extent of the excess over $40,000 of the amount receivable by all other beneficiaries as insurance under policies taken out by the decedent upon his own life.

(h) PRIOR INTERESTS. Except as otherwise specifically provided therein, subsections (b), (c), (d), (e), (f), and (g) shall apply to the transfers, trusts, estates, interests, rights, powers, and relinquishment of powers, as severally enumerated and described therein, whether made, created, arising, existing, exercised, or relinquished before or after February 26, 1926.

(i) TRANSFERS FOR INSUFFICIENT CONSIDERATION. If any one of the transfers, trusts, interests, rights, or powers, enumerated and described in subsections (c), (d), and (f) is made, created, exercised, or relinquished for a consideration in money or money's worth, but is not a bona fide sale for an adequate and full consideration in money or money's worth, there shall be included in the gross estate only the excess of the fair market value at the time of death of the property otherwise to be included on account of such transaction, over the value of the consideration received therefor by the decedent.

(j) OPTIONAL VALUATION. If the executor so elects upon his return (if filed within the time prescribed by law or prescribed by the Commissioner in pursuance of law), the value of the gross estate shall be determined by valuing all the property included therein on the date of the decedent's death as of the date one year after the decedent's death, except that (1) property included in the gross estate on the date of death and, within one year after the decedent's death, distributed by the executor (or, in the case of property included in the gross estate under subsections (c), (d), or (f) of this section, distributed by the trustee under the instrument of transfer), or sold, exchanged, or otherwise disposed of, shall be included at its value as of the time of such distribution, sale, exchange, or other disposition,

whichever first occurs, instead of its value as of the date one year after the decedent's death, and (2) any interest or estate which is affected by mere lapse of time shall be included at its value as of the time of death (instead of the later date) with adjustment for any difference in its value as of the later date not due to mere lapse of time. No deduction under this subchapter of any item shall be allowed if allowance for such item is in effect given by the valuation under this subsection. Wherever in any other subsection or section of this chapter, reference is made to the value of property at the time of the decedent's death, such reference shall be deemed to refer to the value of such property used in determining the value of the gross estate. In case of an election made by the executor under this subsection, then for the purposes of the deduction under section 812 (d) or section 861 (a) (3), any bequest, legacy, devise, or transfer enumerated therein shall be valued as of the date of decedent's death with adjustment for any difference in value (not due to mere lapse of time or the occurrence or non-occurrence of a contingency) of the property as of the date one year after the decedent's death (substituting the date of sale or exchange in the case of property sold or exchanged during such one-year period."

Treasury Regulations 80, (1937 ed.):

"Art. 11. **Optional valuation date.**—In general, the object of subdivision (j) of section 302 is to make provision whereby the amount of tax otherwise payable may be lessened when, within the year following the decedent's death, the gross estate has suffered a shrinkage in its aggregate value.

If the decedent died after August 30, 1935, the executor may, by an election upon his return, Form 706, if filed within the time prescribed by law or prescribed by the Commissioner in pursuance of law, have the property which was included in the gross estate on the date of the decedent's death valued as of the applicable dates, as follows:

(1) Any property distributed, sold, exchanged, or otherwise disposed of within one year after the decedent's death, valued as of the date of such distribution, sale, exchange, or other disposition, whichever first occurs;

(2) Any property not distributed, sold, exchanged, or otherwise disposed of within such one-year period, valued as of the date one year after the date of the decedent's death;

(3) Any property, interest, or estate which is affected by mere lapse of time, valued as of the date of decedent's death; except that an adjustment is to be made for any difference in its value, not due to such lapse of time, as of the date one year after the date of decedent's death, or as of the date of its distribution, sale, exchange, or other disposition, whichever date first occurs.

Property "distributed" is limited to distributions thereof by the executor, or by the trustee in the case of property included in the gross estate under subdivision (c), (d), or (f) of section 302, as amended. Distribution may be effected by the entry of the order or decree of distribution, or, if there is no such order or decree, by the segregation or separation of the property from the estate or the trust, or by the actual paying over or delivery of the property to the person entitled thereto by the will, or under the law, or by the terms of the trust.

The sale, exchange, or other disposition, to which subdivision (j) refers, may be one made by the executor, or by the trustee of property included in the gross estate under subdivision (c), (d), or (f) of section 302, as amended, or by any other person to whom the property had not been distributed by the executor or by such a trustee, or to whom it had not passed from the gross estate as the result of a sale, exchange, or other disposition thereof, as, for example, a sale, exchange, or other disposition by an heir, devisee, donee or grantee to whom the decedent in his lifetime transferred the property, or by the survivor of the decedent if the property had been held by them subject to the right of survivorship.

Property, in the case of a sale, exchange, or other disposition thereof within the one-year period, is to be valued as of the date when it ceases to form a part of the gross estate, that is, the date when the title passes as the result of its sale, exchange, or other disposition. The terms, "distributed," "sold," "exchanged," "or otherwise disposed of" comprehend all possible ways by which property may be separated or passed from the gross estate. Thus, money

on hand at decedent's death which is thereafter used in the payment of the funeral expenses, or in settlement of claims against the estate, or is invested, falls within the term "otherwise disposed of."

The property to be valued as of one year after the date of decedent's death, or as of date of decedent's death, or as of some intermediate date, is the property included in the gross estate on the date of the decedent's death. As property and its value are separate and distinct, the former denoting legal rights, the latter the monetary measure of such rights, and as subdivision (j) treats of the two separately, it will be necessary in every case first to determine what property constituted the gross estate at decedent's death. Subdivisions of section 302, as amended *other* than subdivision (j), supply the information necessary to that determination, subdivision (j) being, in the main, confined to the date or dates as at which the value is to be ascertained.

Interest-bearing obligations, such as bonds and notes, embody two promises, one to pay principal and the other to pay interest, and both promises are a part of the gross estate at the death of the decedent, if the obligation was then owned by him, or had been previously so transferred by him, or at his death there was vested in him any such right or power in or with respect to the obligation as to bring it within any of the other subdivisions of section 302, as amended. If the valuation date is that of decedent's death, the principal of the obligation and interest then accrued and unpaid thereon are to be valued as of that date. If the valuation date is subsequent to death, the principal and interest then accrued and unpaid are to be valued as of that date. The valuation date of any part payment of principal or of any installment of interest, made between decedent's death and the date as at which the obligation is to be valued, will be the date of such payment. Like rules will govern, so far as applicable, when any other obligation is involved, as, for example, one calling for the payment of rent or a royalty. Thus, in the case of rent, if the realty and the obligation to pay the rent reserved were parts of the gross estate at the time of decedent's death, the value of the former must be determined as of the applicable valuation date, and also the value of the rent then accrued and unpaid reserved by the latter. The valuation date of any

rent paid in the interim pursuant to the rental obligation will be the date of its payment.

As in the case of bonds and notes, the interest accrued and unpaid upon a judgment on the date as of which the judgment is to be valued is to be included in the valuation. The valuation date of any part payment of the judgment, or of any interest thereon (without regard to whether earned before or after decedent's death), made between decedent's death and the date as of which the judgment is to be valued, will be the date of such payment.

When corporate stock is a part of the gross estate at decedent's death, and a dividend in partial liquidation is thereafter paid on or before the date as of which the stock is to be valued, the valuation date of such dividend will be the date of its payment. Similarly, a dividend paid within the same period out of earnings, whether *the earnings are* made or accumulated prior or subsequent to decedent's death, will be valued as of the date of its payment. Earnings of the corporation neither declared as a dividend nor paid between decedent's death and the valuation date of the stock, will be reflected in the value of the stock. But a dividend declared prior to the valuation date of the stock and payable subsequent thereto will not be so reflected if the stock is selling "ex dividend" on such valuation date, but is to be valued as of that date.

Differing from payments of principal and interest in the case of bonds and notes, those made upon a judgment are not pursuant to a promise but to an obligation imposed by law, which obligation, in its totality, is a part of the gross estate at decedent's death if coming within any of the other subdivisions of section 302, as amended. So, too, liquidating dividends and dividends paid from earnings are not pursuant to a promise but are referable to legal rights inherent in stock ownership.

By way of illustrating the operation of subivision (j), there is given the following example in which the death of the decedent will be taken to have occurred December 1, 1935:

Description	Valuation Date	Value at Valuation Date	Value at Date of Death
Improved real estate — not disposed of within year following decedent's death	Dec. 1, 1936	$30,000	$35,000
Rents accrued but unpaid under lease antedating decedent's death	Dec. 1, 1936	900	500
Rent paid Jan. 1, 1936	Jan. 1, 1936	600	....
Bonds sold June 1, 1936	June 1, 1936	59,400	60,000
Interest accrued and unpaid thereon	June 1, 1936	400	400
Interest paid Apr. 1, 1936	Apr. 1, 1936	1,200	....
Corporate stock — distributed to legatee Nov. 1, 1936	Nov. 1, 1936	100,000	200,000
Cash dividend paid upon such stock Aug. 1, 1936	Aug. 1, 1936	100,000	....
Bonds matured and paid Oct. 1, 1936	Oct. 1, 1936	12,000	12,000
Interest accrued	....	....	80
Interest paid at maturity	Oct. 1, 1936	240	....
Interest paid Apr. 1, 1936	Apr. 1, 1936	240	....
Corporate stock — not disposed of within year following decedent's death, and upon which no dividend was paid in that period	Dec. 1, 1936	50,000	100,000
Total value of gross estate pursuant to the election		354,980	
Total value of gross estate as of date of decedent's death			407,980

Properties, interests, or estates which are affected by mere lapse of time include patents, estates for the life of *a person* other than the decedent, remainders, reversions, and other like properties, interests, or estates. The phrase "affected by mere lapse of time" has no reference to obligations for the payment of money, whether or not inter-

est-bearing, the value of which changes with the passing of time. However, such an obligation, like any other property, may become affected by lapse of time when made the subject of a bequest or transfer which itself is creative of an interest or estate so affected.

The date of valuation of any property, interest, or estate so affected is, as prescribed in subdivision (j), the date of decedent's death, but with an adjustment to be made of the value then obtaining, which adjustment, while disregarding any later increase or decrease in value due solely to lapse of time, adds to or substracts from the value at death any difference between that value and the value as of the date one year after decedent's death, or the applicable intermediate date, if, and to the extent that, such difference was due to a cause or causes other than lapse of time. Accordingly, in the valuation of any property, interest, or estate affected by lapse of time, the difference between its value at decedent's death and its value as of the later date must be analyzed to determine the portion of such difference attributable to other cause or causes, and that portion only is to be applied in adjusting the value as of the date of the decedent's death. If, for example, the decedent owned a patent which on the date of his death had an unexpired term of ten years and a value of $100,000, and if the patent was sold six months after the decedent's death, at which time, because of the lapse of time and other causes, only $65,000 was realized therefor, the value would be determined as follows:

Value of patent on date of decedent's death		$100,000
Difference between value on date of death and date of sale ($100,000 minus $65,000)	$ 35,000	
Portion of such difference due to the six months elapsing between date of death and date of sale (one-half of 10% of $100,000)	5,000	
Portion of difference due to causes other than lapse of time		30,000
Adjusted value of patent		70,000

Or, to give another example, it may be supposed that the decedent was entitled to receive property which, at the time of his own death, was worth $50,000, upon the death of another person who was entitled to the income therefrom for life and who was 31 years old at the time of the decedent's death. The value at decedent's death of his remainder interest would, as explained in article *10(i)* of these regulations, be $15,631, and if, due to economic conditions, the property declined in value and became worth $40,000 one year after the date of decedent's death, the value of the remainder interest would be determinable in the following manner:

Value of remainder interest at decedent's death (50,000 times factor (0.31262) shown opposite age 31 in column 3 of Table A, article *10*)	$15,631.00
Value of remainder interest one year after decedent's death (40,000 times factor (0.31929) shown in Table A, for age 32)	12,771.60
Net difference due in part to decline in value of the property and in part to increase in the value of the remainder interest due to lapse of time	2,859.40
Elimination of the increase due to lapse of time (50,000 times the difference between the factor for age 32 and the factor for age 31, or 0.00667)	33.50
Portion of the difference in value due to the decline of the property	3,192.90
Value of remainder interest at decedent's death	15,631.00
Less portion of difference not due to lapse of time	3,192.90
Adjusted value of remainder interest	12,438.10

(The amount of the adjustment may be computed more readily by multiplying the decline in the value of the property ($10,000) by the factor (0.31929) applicable to the later date.)

Deductions authorized under section 303 are limited to the extent that allowance thereof is not, in effect, given in the valuing of the gross estate. Property passing by decedent's will, or passing by a transfer made by the decedent in his lifetime (if the transfer was such as to require the property transferred to be included in the gross estate) to or for any such public, charitable, or religious uses as are described in section 303(a)(3) or in section 303(b)(3), is deductible at its value as of the date of the decedent's death, subject, however, to adjustment for any difference in value one year after such death, or at the date of the sale or exchange in the case of property sold or exchanged during such one-year period. But no such adjustment may take into account any difference in value due to lapse of time or to the occurrence or non-occurrence of a contingency.

The election is available to the executor only at the time the return is filed, and only if the return is filed within fifteen months from the decedent's death, or within the period of an extension of time for filing granted under the provisions of article 68 or 69 of these regulations. The election applies to all the property included in the gross estate on the date of the decedent's death. It cannot be applied only to a portion of such property. The election, if exercised, cannot be rescinded.

In every case where the election is exercised, the return, Form 706, must set forth (1) an itemized description of all property included in the gross estate on the date of the decedent's death, together with the value of each item as of that date, (2) an itemized disclosure of all distributions, sales, exchanges, and other dispositions of any of the property during the one-year period after the decedent's death, together with the dates thereof, and (3) the value of each item of property determined in accordance with the provisions of subdivision (j). The amount of any income accrued and unpaid at the date of the decedent's death on each item of principal, the amount of any income collected or otherwise realized thereon after the decedent's death and prior to the date as of which the item of principal is to be valued, and the amount of any income accrued and unpaid thereon at such subsequent valuation date, shall be separately shown. All the information indicated by Form 706 must be supplied. Statements as to distributions, sales, exchanges, and other dispositions of the property within the one-year period must be supported by evidence. If the

court makes an order or decree of distribution during that period, a certified copy thereof must be submitted as part of the evidence. The Commissioner may require the submission of such additional evidence as is deemed necessary."

The statement of the House managers of the conference committee on the bill, H. R. 8974, which was printed with the conference committee report contains the following specimen computation illustrating the workings of the optional valuation provision (H. Rep't. No. 1885, 74th Cong., 1st Sess., pp. 10-11):

> * * * If the executor exercises the election given him by the conference agreement, all the property included in the estate on the date of death is to be valued as of the date 1 year after the decedent's death, except that the value (at the time of distribution, sale, exchange, or other disposition) of property distributed, sold, exchanged, or otherwise disposed of, is taken in lieu of its value as of 1 year after death. * * * The operation of this new provision giving the executor an election may be shown by the following example:
>
> A decedent dies owning real estate of the value of $100,000, corporate stock of the value of $60,000, bonds of the value of $20,000, foreign government bonds maturing 9 months after date of death of a face value of $10,000, but of a value of $9,550, and cash amounting to $5,000. These values are as of the date of death. The gross estate at date of death amounted, therefore, to $194,550. The decedent had debts of $15,000 and the administration expenses were $25,000, which debts and expenses were promptly paid by the executor. The value of the net estate as of date of death was, therefore (after taking off the specific exemption), $114,550. Six months after the decedent's death the executor distributed the bonds to a legatee under the will, at which time they were worth $18,000, and he sold all the corporate stock owned by the decedent for a fair market value of $50,000 in order to raise cash to pay the debts and expenses. The foreign bonds were paid in full at maturity. During the first year after the decedent's death the value of his real estate appreciated $5,000.

The executor elects to take advantage of the provision of the bill. The value will be arrived at in this way:

Assets:	Value
Real estate (as of 1 year after death)	$105,000
Corporate stock (as of date of sale)	50,000
Bonds (as of date of distribution)	18,000
Foreign bonds (as of date of disposition, i. e., maturity)	10,000
Cash	5,000
	$188,000
Deduct:	
Debts	$15,000
Administration expenses	25,000
Specific exemption	40,000
	$108,000

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Supreme Court, U. S.
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No. 274.

IN THE

Supreme Court of the United States

October Term, 1940.

HERBERT H. MAASS, as Sole Surviving Executor of the Last Will and Testament of Ida H. Saks, Deceased,

Petitioner,

—against—

JOSEPH T. HIGGINS, Collector of Internal Revenue for the Third District of New York,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT.

REPLY BRIEF FOR THE PETITIONER.

WILBUR C. DAVIDSON,
Counsel for Petitioner.

Of Counsel:

HERBERT H. MAASS,
DAVID J. LEVY,
of New York, N. Y.

MELVILLE F. WESTON,
of Boston, Mass.

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REPLY BRIEF FOR THE PETITIONER.

I. The respondent's argument for taxation of so-called "income rights", as distinguished from income *per se*, is neither consistent with nor capable of sustaining the Regulation.

The foundation of the respondent's argument is that what is being taxed is the so-called "income rights", which it is claimed *do* exist at death, as distinguished from the respective items of rents, dividends and interest, *per se*, which it is admitted *do not* so exist, but which are collected during the optional year (Res. Br. 4). Having admitted that the items of income cannot themselves be included, he asserts that they measure the value of pre-existing "income

rights", which are said to be "disposed of" when the income is collected (Res. Br. 5). Thus, by the back door,—so to speak—he draws the income itself into the taxable estate. We will show that the supposed distinction is baseless (a) because what was taxed in this very case was the rents, dividends and interest *per se*, and not any so-called "income rights"; (b) because it is utterly inconsistent with the very terms of the Regulation, as well as the practice of the Bureau of Internal Revenue in its application and enforcement; and (c) because it is artificial and based rather in nebulous theory than in any reality, and is in any event incapable of sustaining the Regulation.

The Regulation purports throughout its length to require the inclusion in the gross estate of the specific items of the interim income, as collected, *per se*, and not the inclusion of the value of alleged "income rights", measured by the amount of net income collected (Pet. Br. 46-48).

Similarly, the record in this case clearly shows that the issue is the propriety of the Commissioner's inclusion in the gross estate of the interest, rents and dividends, as such; and the "Question Presented" in the petitioner's brief was thus properly stated (Pet. Br. 2).

The claim for refund asserted that the Commissioner had included in the gross estate "the amount of income collected or otherwise accrued or realized * * * between the date of death and the valuation date" (R. 9). The Commissioner's letter disallowing the claim held to be proper "the inclusion of dividends and interest that had accrued to the optional valuation dates" (R. 11-12). The complaint alleged that the Commissioner had wrongfully included in the gross estate moneys which "represented income, to wit, rents, dividends and interest earned by and upon the property and assets of the estate subsequent to the date of death of said decedent" (R. 5).

This averment the answer did not deny, but even affirmatively alleged (R. 13-14), and it must be deemed admitted.

The case was heard and disposed of on the pleadings (R. 15-17), and it was certainly the clear import of the pleadings that what the Commissioner included in the gross estate was in fact the specific items of income of the year following the date of death. As the Government in its brief (pp. 5, 15) admits that "petitioner is clearly correct in his contention that income received by the estate during the year after death, which plainly did not belong to the decedent at the time of his death, is not to be included in the gross estate for purposes of optional valuation", the record requires judgment in the petitioner's favor.

This is the reason why the respondent, in order to lay the foundation for the extended rationalization of the Regulation, finds it necessary to state the issue in a form inconsistent with the specific terms of the Regulation, with the literal meaning of the record, and even with the statement of the question as presented in the respondent's own brief in opposition to certiorari (p. 2). The respondent *now* states the question to be whether, in view of the optional valuation provision, "rights to interest, rent and dividends owned by a decedent at the date of his death are property of the estate within the meaning of this section" (Res. Br. 2).

Even this statement, however, does not accurately forecast the argument to be presented, though it appears to have been carefully phrased to prejustify that argument. The question is not whether rights owned by a decedent at the date of death are part of the property of his estate at death. That is hardly even a question. The issue to which the respondent's lengthy argument is actually addressed is whether, when interest, rent and dividends are col-

lected by executors, there occurs a "disposition" of any "property" which the decedent owned, within the meaning of those words as used in the statute.

We shall now assume, therefore, for purposes of argument, that the record may be construed as saying that the Commissioner included in the gross estate, not the income as such, but a certain sum in dollars which sum was equal to the income received in the year after death and was included because it was equal to that income.

The Commissioner has included this money in the gross estate because, it is now said, at the time of the collection of the interest, rents and dividends certain rights were "disposed of" by the executor, and the interest, rents and dividends were the measure of the value of the rights so disposed of (Res. Br. 5). The respondent thus places his whole case squarely upon that portion of the optional valuation statute which reads:

> "Property included in the gross estate on the date of death and, within one year after the decedent's death, * * * sold, exchanged or otherwise disposed of, shall be included at its value as of the time of such distribution, sale, exchange or other disposition, whichever first occurs, instead of its value as of the date one year after the decedent's death."

To meet the Government upon its own ground, it is therefore necessary to embark upon some discussion of the meaning of "property" and of "disposition". But before we do so, we wish to emphasize that we have never deemed such a discussion to be necessary to the decision of this case. We have said that the natural and simple meaning of the statute to the ordinary man, the legislative history of

the statute, the absence of any express words calling for the inclusion of sums equal to the income although such words could easily have been inserted, the use by the Congressional Committee of an illustration in which no such sums were included, the fact that the inclusion of such sums diminishes by so much the relief plainly intended, and in addition brings in its train numerous difficulties and incongruities, and finally those rules for the construction of statutes to which this Court has frequently adverted, to all of which we have referred in our brief—we have said that all these considerations required that the statute be given its plain common sense meaning, as both laymen and lawyers, at least prior to the Regulation, would have thought inevitable; and we would not have supposed that it would be material, or consonant with the spirit of recent decisions of this Court; to oppose to these considerations a refined and elaborate discussion of the fragments into which, upon close analysis, the concept of property can be broken.

We rely as strongly as ever upon the considerations summarized above, but we shall proceed to show that the Government's position, upon the ground of its own selection, remains untenable.

The respondent concedes that the general right of the decedent "as against the whole world, to enjoy whatever income his efforts may produce from the property which he owns" (Res. Br. 54), affords no foundation for drawing into the gross estate the results of what his executors may do to develop that right. If a man dies owning money or land, and his executor, under powers given in the will, lends the money, rents the land or buys shares of stock, the Government, as we understand it, concedes that when those arrangements result in the receipt of interest, rents or dividends during the year following death, these sums will not be the measure of anything includible in the gross estate (Res. Br. 53).

However, the Government contends that if at the time of the decedent's death, arrangements to develop the productivity of the property have already been entered into, *i. e.*, the money has been lent and a note or bond received, the land has been leased, or the investment in corporate stock has been made, the right to future income inherent in those arrangements constitutes "property" within the meaning of the statute, and that this "property" is "disposed of" within the meaning of the statute when interest, rents and dividends eventually become due and are collected (Res. Br. 15-16, 18-19, 19-42).

We believe this contention to be fallacious. In real substance, what is disposed of when the income is collected is not the general right which existed at the date of death, namely a right to all future income when due, but rather the concrete present right, to wit, the right to be paid at the time for actual payment. That latter right has arisen since the decedent's death. Its arising and its disposition leave untouched the general right which the decedent had and which persists. The bond still bears interest. The land is still at rental. The stock still may pay dividends. Nothing has been anticipated, nothing sold, nothing disposed of (Pet. Br. 12-13).

Economic realities verify these assertions. Had the executor sold the entire estate at once and reinvested the proceeds, the income from the new investments would have been no part of the taxable estate. Yet the income, whether from old investments or new, is equally the fruit of the new ownership which dates from the date of death.

In the case of interest and rents this is exceedingly simple and plain. The interest is fundamentally pay for the continued detention of the money, and from and after the date of death it has been the money, not of the decedent, but of the executor which has

been detained. The rent is fundamentally a payment for the continued use and occupation of the land, and from and after the date of death it has been the land, not of the decedent, but of the devisees or heirs that has been used and occupied.

The case of dividends is somewhat more complex, on the one hand because the general right to receive dividends "if, as and when" is more remote than the promise to pay interest or rents at specified intervals, and on the other hand because the rights inhering in the general ownership of the stock do not call for any clear allocation of dividends declared as being against the earnings of any particular period. But the same fundamental consideration is present, namely, the continued corporate use of those assets of which the executor is now fundamentally a co-owner with the other stockholders. And the difficulty, if it be a difficulty, is easily resolved by treating the ordinary dividend for estate tax purposes in a way which corresponds to the manner in which the dividend is conversely treated for income tax purposes. Thus, consistency is achieved as between the estate tax and income tax laws, and the Government is no more unfairly treated with respect to the estate tax situation than is the stockholder with respect to he income tax situation (Pet. Br. 16-20).

We therefore sum up what we have to say with respect to the meaning of "property" and with respect to whether the executor has "disposed of" any property which the decedent possessed at his death, in this wise: The direct and immediate obligation to pay the interest, rent or dividend is not "property" in existence at death, but on the contrary, arises after death and corresponds in economic reality to the considerations currently moving from the present owners of the property. On the other hand, the right which inhered in the arrangements made by the decedent

is not being disposed of in any real sense when the interest, rent or dividends are received; there is merely fulfillment, and if the fulfillment in the case of the loan or the lease brings nearer the date of the termination of the loan or the lease, and hence of the termination of such benefits (or detriments) as the existence of the loan or the lease may be thought to confer, this fulfillment also brings equally nearer the date when the money will be restored to its owner and the land will revert, free once more for the making of new arrangements to develop its productivity. These two elements of value or detriment cancel each other, and the income is left to be, as it truly is, the fruit of the investment as it has gone on in the hands of its new owner subsequent to the date of death.

II. The test of "accessibility" or "availability" is both fallacious and unsupported by the statute.

The intent of the statute was to afford relief against the diminution, during the year, of the value of the property which the decedent owned. This has its relationship to the question of what is available to the executor at the end of the year, but the relationship is imperfect. Even the Government must concede that the income resulting during the year from new leases made by the executor, and as well the ordinary income of new investments, and realized or unrealized increases in the value thereof, will not be includible in the gross estate, as the measure of value of a "right", even though they too are "available". Also, when the optional valuation is not used, the income resulting during the year from investments made by the decedent is not included in the gross estate as the measure of value of a "right", though

it is available* in this case also. The introduction of the alleged test of "availability" into the determination of the issue when the optional valuation is used is a gratuitous attempt to diminish the relief afforded, by the application of a criterion which in no other aspects of the administration of the law has ever become significant.

The Government contends that the inclusion of a sum equal to the income is necessary to limit the boundaries of the relief to true relief (Res. Br. 45-47). A case is put in which "an estate would actually have more at the end of the one-year period, because of income receipts and accruals, than it had at the date of death, despite a decline in market values", and such a case is said to "present the anomaly of an extension of tax relief to a taxpayer whose ability to pay the estate tax had actually been increased" (Res. Br. 47). The fallacy of this contention is that the Government is ignoring the fact that the estate would always have had the first year's income available, whether there were shrinkage or not, and whether there were an optional valuation or not. The extent to which the distributable estate is diminished by shrinkages in market value which occurred during the year is properly determined by comparing the situation existing at the end of the year with that which would have existed at the end of the year had prices not gone down. If the market value of the assets drops $50,000 during the year, there is a shinkage of $50,000, no matter how much income is received, for the income would have been received in either case.

The further obvious answer is that, under the stat-

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* We are now using "available" in the sense in which it is used in the respondent's brief, as meaning "available for distribution" (Res. Br. 45). Such income is not "available" or "accessible" for the purpose of paying the estate tax. (See Int. Rev. Code §827(a); *Matter of Andrus*, 169 Misc. (N. Y.) 740.)

ute, an estate which, subsequent to death and during the optional year, disposes of its assets at a loss from the date of death, and then makes large gains on new investments, leaving the estate, at the end of the optional year, larger than as at the date of death, will still be entitled to the relief afforded by the statute, by being taxed only upon the value at which the assets were disposed of, and not upon the value either as at the date of death or as it may actually exist at the end of the year, inclusive of its realized or unrealized profits from such new investments.

The truth of the matter is that the Commissioner is troubled about a case in which, he imagines, something will be done by the executor to change the income. He is worried about the imaginary case of an executor who would have received a certain amount of income had there been no optional valuation, but who takes steps to cause the income to be greater because he perceives a benefit to flow from that course in view of the optional valuation. The Commissioner thus unnecessarily seeks to sacrifice the relief of all ordinary cases, in order to avoid abuse of the relief in an extraordinary case which he fears Congress has not guarded against.

III. The Regulation is not needed to prevent "tax avoidance", for the statute, in the light of practical considerations, is adequate to this end.

This brings us to what we deem to be the core of the case which the Government is really litigating. It is summed up at page 6 of respondent's brief. It is that "petitioner's position would allow executors in many cases to write a large part of their own tax bill by the simple device of selling the coupons attached to decedent's bonds, or making an assignment of rents due in the future under a lease, or causing

a corporation in which the decedent owns stock to declare extraordinary dividends." This, it is said that Congress did not intend (Res. Br. 6).

Thus it is asserted that, to close an avenue of tax avoidance alleged to exist in some cases, and which it is said that Congress did not intend, the relief of all taxpayers (which it is clear that Congress did intend) should be abridged by a construction of the statute which finds, as we contend, no support in the legislative history, and which is sought to be drawn within the meaning of the express words of the statute only by an attenuated analysis of the concept of "property" and a remote construction of the term "disposition".

This amounts to legislation, not interpretation through regulation, and we deny its right to prevail even if the evils were as imagined. Actually, however, they are grossly exaggerated.

The supposed cases of selling off coupons in advance, or of making an assignment of future rents, may be dealt with so easily as to afford no problem at all. Unlike the collection of ordinary interest or rents as due, such transactions operate to affect adversely the value of the basic property. The right to the return of the money loaned then stands divorced from the right to receive the pay for its detention for a period not yet ensued; the right to have the land revert stands separate from the right to be compensated for its use as the use occurs. We cannot imagine any court having difficulty with holding that such anticipation constitutes a disposition of a part of what the decedent owned, for such anticipation leaves to be valued at the optional date, one year from death, an asset fundamentally altered from that which the decedent owned at death. There has been amputated from the property its capacity to earn for its owners. The bond stands curtailed and is unmarketable. The rever-

sion stands subject to the lease, but without the benefit of the rents reserved.

It is not for the prospect of such futile "avoidances" as these that the court should deprive all taxpayers of a portion of the relief intended.

The case of dividends, however, may require more consideration. In the first place, the great bulk of stockholders have no such control over the corporations in which they have investments as would enable their executors to vary the flow of dividends for tax purposes. In the second place, most stockholders who are so situated as to have that power, are probably also so situated, for business reasons, that it would be impracticable for their executors to do so. This will be true of businesses which have their surpluses largely invested in plant or inventories against current or possible future needs. Thirdly, in the case of personal holding companies, which is the case about which the Commissioner is really worrying (Res. Br. 40), the current level of income tax rates bears such a relationship to the current level of estate tax rates as to be a tremendous deterrent to the making of such extraordinary distributions. The larger the amount to be distributed, the larger the deterrent will be found to be.

Only when these considerations have been exhausted do we need to come to consider whether a distinction may be drawn between "ordinary" and "extraordinary" dividends, for the purpose of predicting the judicial method of striking down such imagined cases of "avoidance" (*Cf.* Res. Br. 40-41). We do not deem it necessary to embark upon this discussion, although reasonable means can easily be found within the framework of the statute to control even this situation, having in mind the extent to which, both by statute and decision, it has been found possible to prevent the effectuation of tax consequences through the manipulation of corporate structure.

We conclude, then, that the Commissioner's fears are largely groundless, and we suspect that they are put forward merely to implement the desire, implicit in the Regulation, to diminish in all cases the relief afforded by the optional valuation.

IV. Incongruities inherent in the regulation and in the respondent's argument in its defense demonstrate its lack of foundation in the statute; similar suggestions of the respondent are without merit.

References to specific incongruities which flow from the Regulation and which are implicit in its operation are, of course, valuable only in so far as they have any tendency to demonstrate whether or not Congress intended to tax the interim income, and that is the sole basis upon which the suggestions of the petitioner on this score are offered. We respectfully submit that such instances as have been pointed out by the petitioner have not been met in the least iota; and that similar examples attempted to be offered by the respondent hold no water whatever.

It is quite obvious, we think, that crops grown after death upon land owned by a decedent, and the offspring conceived or coming into being after a decedent's death of livestock owned by him, arise from the capital asset in quite the same sense as does the dividend, for example, arise from the share of corporate stock owned by a decedent. However, the Commissioner, faced with the patent impossibility of applying the theory of the Regulation and the argument offered to support it to such types of income, sidesteps the issue by saying merely that they are not mentioned in the Regulation, and that information has been received from the Bureau of Internal Revenue that it is not its policy or practice to include crops planted after the date of death, or livestock born after that date (Res. Br. 53). Even in this

description of the practice, nothing is said about crops planted before the date of death and coming to fruition thereafter, so that even the Regulation and the practice together remain an incomplete exposition of what the Commissioner conceives to be the Congressional intent. Moreover, we respectfully submit that the respondent's answer that crops and offspring of livestock are not taxed quite begs the issue. If the dividend is "referable" to the shares of corporate stock, then so by all means are the crops and offspring referable to the land and original livestock. The Regulation, failing to go that far, implicitly recognizes this inconsistency, and it is no answer whatever to say that crops and offspring of livestock are not involved in this case.

Similarly, it is no answer to our argument that the fact that the statute did not furnish a definition for the valuation of so-called "income rights", and that therefore the existence of such rights as property to be included in the taxable base was not contemplated (Pet. Br. 30), that the Bureau of Internal Revenue in practice seeks to include only the net income, and to allow the deduction of certain expenses of creating such income (Res. Br. 58). The statute, had it intended that interim income should be taxed, would normally have defined how any "rights" thereto should be valued. It did not. Neither did the Regulation, although adopted more than a year afterwards, this for the simple reason that the Regulation did not seek, as the respondent now contends, to include the value of "income rights", but each specific item of gross income collected. The Bureau of Internal Revenue, subsequent to the adoption of the Regulation, and in actual experience in its administration, finds it necessary to make additional concessions—deduction of costs of producing the income—which find neither basis nor definition either in Regulation or in statute, the estate being remitted to the protection of an al-

leged practice nowhere officially confirmed and admittedly not uniform (Res. Br. 59).*

A further incongruity which we have pointed out as being implicit in the Regulation, *i. e.*, the requirement that there be included in the taxable estate the amount, actual or hypothetical, of rents, interest and dividends upon property transferred in contemplation of death, meets with no suggestion of a reply on the part of the respondent. We respectfully submit that there is no reason for this silence except the simple fact that there is no answer which has any foundation in the statute.

This confusion inherent in the Regulation, and in its enforcement and defense, is not here made the subject of mere complaint. It demonstrates that the Commissioner has not found it possible to apply the theory of the Regulation with uniformity to all kinds of income; that the line of demarcation between its applicability to one kind of income and another is still vague; that the practice is compelled to depart from the Regulation by taxing net instead of gross income, and even this without definition and not uniformly; and that it has not been found practicable even after five years of the statute to make the Regulation

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* The respondent offers the concession (Res. Br. 58-59) that only the *net* income can be taxed, admitting that the Regulation is silent on this score. The statement is made that the policy of the Bureau is to that effect. A footnote (p. 59) tells us that although there may have been instances to the contrary, these do not reflect the general policy and practice. Compare this with the fact, for example, that in *Estate of William J. Morris, Deceased*, B. T. A. Docket No. 100,851 (submitted but not decided) in the brief filed November 1, 1940 by the General Counsel to the Bureau of Internal Revenue the question presented is stated to be "Whether the amount to be included as income from rentals for the optional valuation period is the gross rentals of $8,845.22 or the net rentals of $2,540.06 after deducting expenses aggregating $6,305.16 incurred in operating the properties?"; and it is specifically contended that the *gross*, and not the *net*, rents are to be included in the taxable estate. A certified copy of this brief has been filed with the Clerk of the Court.

coherent or complete, or its administration uniform. These difficulties stem from and testify to the lack of any chart in the statute, and to the absence of any Congressional intent as respects interim income, to be implemented by regulation. They show that the Regulation gropes blindly in its attempt to legislate, rather than interpret.

The respondent, having for the most part endeavored to concede himself out of the difficulties which we have propounded, mentions three instances of alleged inconsistencies or incongruities said to be inherent in the petitioner's construction, and which apparently he thinks are such that they reflect Congressional intent that the interim income be included. These, we think, are quite easily disposed of, and are of no weight in the scale.

The first refers to "an illogical distinction between increase in the value of estates due to accumulated corporate earnings, which are reflected in an increased value of the stock, and those due to distributed corporate earnings" (Res. Br. 55). This argument is belied by common experience, and also by the decision of this court in *Lynch* v. *Hornby*, 247 U. S. 339. The withholding of distribution of corporate earnings in the form of dividends is at least as likely to decrease the value of corporate shares at the optional valuation date as to increase it. The "illogical distinction" has, therefore, no basis in fact.

Next, it is suggested by the respondent that the failure to collect coupons attached to a bond would cause the bond to be valued at the end of the year for more than would have been the case had the coupons been detached; that the bond would then be included at the increased value at the optional date; and that therefore the coupons should be similarly valued if collected in order to avoid any irrational distinction. This ignores the rule in income taxes that a taxpayer, even when on a cash basis, cannot

avoid the inclusion of the interest in his taxable income by the device of refraining from collecting the coupons, which are treated as constructively received. Correspondingly, in the estate tax case, the value of the matured but uncollected coupons should not be included in the value of the bond at the optional date, and there is no distinction to be obviated.

Petitioner is particularly invited to comment on the treatment to be accorded United States Savings Bonds (Res. Br., pp. 28-29). It is said to be incongruous that these bonds, which *accrue* their interest instead of *paying* it, would be included at the end of the year at their then value, as increased by the passage of time, while under the petitioner's construction interest currently payable and collected on income-paying bonds would not be so included. The answer to the suggested dilemma is that it does not exist. There should simply be deducted from the value of the savings bonds at the end of the year such sums as represent the increase in value during the year, either in simple recognition of the economic reality that the increase is but a substitute for interest, or as a direct application of that portion of the optional valuation statute which requires the elimination of the difference "due to mere lapse of time". Even were this not the correct solution, the instance or illustration of a single unusual type of security which would not be treated equally with others has no tendency to reflect a Congressional intent in the statute to tax future income.

Conclusion.

The assertion is made (Res. Br. 50-51) that there is "a presumption that the legislative authority does not intend to abandon any source of revenue unless that intention be clearly expressed." Hence, it is

said that "anyone claiming favored treatment must bear the burden of showing his claim comes strictly within the statute" (Res. Br. 5). The first words that we have quoted are particularly inapt in view of the fact that the interim income has never been a source of estate taxes, but is now sought to be reached for the first time.* Furthermore, if intellectual assent be given to this alleged "presumption", there is nothing left to the oft-repeated rule for construing tax statutes in favor of the taxpayer. It may be that this rule is on the road toward abrogation, but it will be a strange thing indeed if the abrogation comes the first time in the construction of a provision affirmatively intended to give relief. As to the second quotation, we have already pointed out in our main brief that the optional valuation does not accord "favored treatment" in the sense of treating one taxpayer more kindly than another. The only "favored treatment" accorded is granted to all taxpayers similarly situated, as between themselves and the Government, and the according of this treatment is the very object of the statute. No presumption, therefore, can be invoked to attribute to the respondent's arguments more weight than they intrinsically deserve.

We submit that the receipt of income by the executor does not dispose of property owned by the decedent at his death in any realistic or relevant sense; that the test of "accessibility" or "availability" is foreign to the statute; that the Government's fears of tax avoidance are fanciful and remote, and at best are but insignificant in proportion to the proposed dimi-

* Compare this also with the remarkable assertion (Res. Br. 49) that a decision for the petitioner in this case will result in a "windfall" to the taxpayers, when in reality they are only awaiting, with legitimate expectation, the deferred installment of the relief plainly intended by Congress and up to the present withheld only by the Regulation.

nution of relief to all taxpayers; and that the incongruities and confusions inherent in the Regulation and in the argument offered in its defense demonstrate its lack of foundation in the statute.

Respectfully submitted,

WILBUR C. DAVIDSON,
Counsel for Petitioner.

Of Counsel:

HERBERT H. MAASS,
DAVID J. LEVY,
of New York, N. Y.

MELVILLE F. WESTON,
of Boston, Mass.

January, 1941.

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No. 274

In the Supreme Court of the United States

OCTOBER TERM, 1940

HERBERT H. MAASS, AS SOLE SURVIVING EXECUTOR OF THE LAST WILL AND TESTAMENT OF IDA H. SAKS, DECEASED, PETITIONER

v.

JOSEPH T. HIGGINS, COLLECTOR OF INTERNAL REVENUE FOR THE THIRD DISTRICT OF NEW YORK

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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OPINIONS BELOW

The opinion of the District Court (R. 17) is reported in 29 F. Supp. 996. The opinion of the Circuit Court of Appeals (R. 31) is reported in 111 F. (2d) 78.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 24, 1940 (R. 39). The petition for a writ of certiorari was filed July 23, 1940. The jurisdiction of this Court is invoked under

Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

An estate exercised the option provided in Section 302 (j) of the Revenue Act of 1926, as added by Section 202 (a) of the Revenue Act of 1935, to have the value of the gross estate determined, for federal estate tax purposes, as of the date one year after the decedent's death. The question is whether rents, dividends, and interest earned upon the principal assets, after the date of death, may be included in valuing the estate, as provided in Article 11 of Treasury Regulations 80.

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and regulations involved are set forth in the Appendix, *infra*, pp. 7–14.

STATEMENT

This case was decided by the District Court (R. 17–25) on motion by the taxpayers (R. 15), and cross motion by the Collector (R. 16), for judgment on the pleadings. The material facts, as alleged in the complaint (R. 4–7), may be summarized as follows:

Ida H. Saks, the decedent, a resident of the City of New York, died on August 30, 1936 (R. 4). In the federal estate tax return filed on behalf of her estate, the executors exercised the option, provided by Section 302 of the Revenue Act of 1926, as

amended by Section 202 (a) of the Revenue Act of 1935, to have the value of all the property included in the estate on the date of the decedent's death determined as of the optional valuation date provided in the statute (R. 5).

Pursuant to Article 11 of Treasury Regulations 80, the Commissioner of Internal Revenue included in the amount of the decedent's gross estate the sum of $19,956.32, representing rents, dividends, and interest earned by and upon the property and assets of the estate subsequent to the date of death of the decedent (R. 5, 12). The federal estate tax which was thereafter assessed on this basis was duly paid, and claim for refund was filed and rejected; thereafter the present suit was instituted (R. 4–6).

The District Court decided that the amount in question was properly included in valuing the decedent's gross estate (R. 17–24); its judgment was affirmed by the court below (R. 31–38).

ARGUMENT

This case is the first presented to an appellate court involving the validity of Article 11 of Treasury Regulations 80 (1937 Ed.), *infra*, pp. 8–14. The District Court sustained the Regulations; the court below, Judge Chase dissenting, affirmed.

The Board of Tax Appeals in six cases [1] has fol-

[1] *Estate of Cordelia Y. Abendroth* v. *Commissioner* and *Estate of Kate Read Blacque* v. *Commissioner*, 41 B. T. A. 1178; *Estate of Benjamin M. Spurr, deceased, Wheeling*

lowed the decision of the court below. Only the District Court for the District of Maryland, in *Clark* v. *United States*, 33 F. Supp. 216, has taken a contrary view, holding the Regulations invalid.

Two of the Board cases (the *Spurr* and *Gude* cases) are now on review in the Circuit Court of Appeals for the Fourth Circuit and will probably be reached for argument in October. The Government's appeal from the District Court's decision in *Clark* v. *United States, supra,* will also probably be heard by that court at the same time. The Board's decision in the *Eaton* case, now on review in the Circuit Court of Appeals for the First Circuit, likewise will probably be reached for argument in October. The Board's decision in the

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Dollar Savings & Trust Co. and Arthur Clinton Stewart Spurr, Exrs. v. *Commissioner*, decided by the Board of Tax Appeals May 18, 1940, unreported memorandum opinion; *Estate of Gertrude Eaton, deceased, Robert H. Storer and Roger Amory, Exrs.* v. *Commissioner*, decided by the Board of Tax Appeals May 20, 1940, unreported memorandum opinion; *Estate of Harriet I. G. Singer, deceased, John Addison Singer, Jane Singer Patton and Peoples-Pittsburgh Trust Co. Exrs.* v. *Commissioner*, decided by the Board of Tax Appeals June 5, 1940, unreported memorandum opinion; *Granville Gude and Karl E. Jarrell, Exrs. of Estate of Catharine Loffler* v. *Commissioner*, decided by the Board of Tax Appeals June 15, 1940, unreported memorandum opinion; *Estate of Mildred Mack Mayer, deceased, Lucius W. Mayer, Chester M. Mayer, and Sol M. Stroock, Exrs.* v. *Commissioner*, decided by the Board of Tax Appeals July 13, 1940, unreported memorandum opinion. There are approximately 30 other cases pending in the Board involving this issue.

Abendroth case is on review in the Circuit Court of Appeals for the Second Circuit. The time for filing a petition for review in the *Singer* case will expire September 5, 1940, and if appealed the case will go to the Third Circuit. Final order has not yet been entered in the *Mayer* case, which would go to the Second or Third Circuit.

Six other cases are pending in various District Courts.[2]

We believe that the decision of the court below upholding the Regulations is correct. Moreover, even if the general question involved should be considered doubtful, there appears to be no pressing need for this Court to review it until there has been further litigation in the lower courts. There are aspects of the question which will not be presented by the record in the present case. For example, the District Court in *Clark* v. *United States, supra,* at p. 225, referred to differences between that case and the one at bar which it thought "important if not wholly controlling." It seems likely that several of the Circuits will pass upon the question within the next few months; accordingly, a denial of certiorari at this time will not preclude a later

[2] *Herbert Morse et al., Exrs. u/w William Jardine* v. *Hassett* (Mass.); *Margaret Brewster, Exr. u/w John Brewster* v. *Smith* (Conn.); *Lina Meierhof et al. Tr. u/w Edward Meierhof* v. *Higgins* (S. D. N. Y.); *Seabury Stanton, Exr. u/w Mary Stanton* v. *United States* (Mass.); *Joseph Dumesnil et al. Exr. Est. Harry Dumesnil* v. *Glenn* (W. D. Ky.); *Douglas Van Dyke et al. Exrs. Est. Louise Van Dyke* v. *United States* (E. D. Wis.).

review of this case at this Term if the course of subsequent litigation makes such review advisable.

CONCLUSION

The decision of the court below is, in our opinion, correct. Since the decision is the first by an appellate court upon the point involved, and the question will be presented within a few months to other Circuit Courts of Appeals upon differing records, the petition for a writ of certiorari should be denied at this time.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.
SAMUEL O. CLARK, JR.,
Assistant Attorney General.
SEWALL KEY,
LEE A. JACKSON,
Special Assistants to the Attorney General.

AUGUST 1940.

APPENDIX

Revenue Act of 1935, c. 829, 49 Stat. 1014:

SEC. 202. ESTATE TAX—VALUATION—

(a) Section 302 of the Revenue Act of 1926, as amended, is amended by adding a new subdivision as follows:

"(j) If the executor so elects upon his return (if filed within the time prescribed by law or prescribed by the Commissioner in pursuance of law), the value of the gross estate shall be determined by valuing all the property included therein on the date of the decedent's death as of the date one year after the decedent's death, except that (1) property included in the gross estate on the date of death and, within one year after the decedent's death, distributed by the executor (or, in the case of property included in the gross estate under subdivision (c), (d), or (f) of this section, distributed by the trustee under the instrument of transfer), or sold, exchanged, or otherwise disposed of, shall be included at its value as of the time of such distribution, sale, exchange, or other disposition, whichever first occurs, instead of its value as of the date one year after the decedent's death, and (2) any interest or estate which is affected by mere lapse of time shall be included at its value as of the time of death (instead of the later date) with adjustment for any difference in its value as of the later date not due to mere lapse of time. No deduction under this title of any item shall be allowed if allowance for such item is in effect given by the valuation under

this subdivision. Wherever in any other subdivision or section of this title or in Title II of the Revenue Act of 1932, reference is made to the value of property at the time of the decedent's death, such reference shall be deemed to refer to the value of such property used in determining the value of the gross estate. In case of an election made by the executor under this subdivision, then for the purposes of the deduction under section 303 (a) (3) or section 303 (b) (3), any bequest, legacy, devise, or transfer enumerated therein shall be valued as of the date of decedent's death with adjustment for any difference in value (not due to mere lapse of time or the occurrence or nonoccurrence of a contingency) of the property as of the date one year after the decedent's death (substituting the date of sale or exchange in the case of property sold or exchanged during such one-year period)."

* * * * *

Treasury Regulations 80 (1937 Ed.):

ART. 11. *Optional valuation date.*—In general, the object of subdivision (j) of section 302 is to make provision whereby the amount of tax otherwise payable may be lessened when, within the year following the decedent's death, the gross estate has suffered a shrinkage in its aggregate value.

If the decedent died after August 30, 1935, the executor may, by an election upon his return, Form 706, if filed within the time prescribed by law or prescribed by the Commissioner in pursuance of law, have the property which was included in the gross estate on the date of the decedent's death valued as of the applicable dates, as follows:

(1) Any property distributed, sold, ex-

changed, or otherwise disposed of within one year after the decedent's death, valued as of the date of such distribution, sale, exchange, or other disposition, whichever first occurs;

(2) Any property not distributed, sold, exchanged, or otherwise disposed of within such 1-year period, valued as of the date one year after the date of the decedent's death;

(3) Any property, interest, or estate which is affected by mere lapse of time, valued as of the date of decedent's death; except that an adjustment is to be made for any difference in its value, not due to such lapse of time, as of the date one year after the date of decedent's death, or as of the date of its distribution, sale, exchange, or other disposition, whichever date first occurs.

Property "distributed" is limited to distributions thereof by the executor, or by the trustee in the case of property included in the gross estate under subdivision (c), (d), or (f) of section 302, as amended. Distribution may be effected by the entry of the order or decree of distribution, or, if there is no such order or decree, by the segregation or separation of the property from the estate or the trust, or by the actual paying over or delivery of the property to the person entitled thereto by the will, or under the law, or by the terms of the trust.

The sale, exchange, or other disposition, to which subdivision (j) refers, may be one made by the executor, or by the trustee of property included in the gross estate under subdivision (c), (d), or (f) of section 302, as amended, or by any other person to whom the property had not been distributed by the executor or by such a trustee, or to whom it had not passed from the gross estate as the result of a sale, exchange, or other dis-

position thereof, as, for example, a sale, exchange, or other disposition by an heir, devisee, donee, or grantee to whom the decedent in his lifetime transferred the property, or by the survivor of the decedent if the property had been held by them subject to the right of survivorship.

Property, in the case of a sale, exchange, or other disposition thereof within the 1-year period, is to be valued as of the date when it ceases to form a part of the gross estate, that is, the date when the title passes as the result of its sale, exchange, or other disposition. The terms "distributed," "sold," "exchanged," "or otherwise disposed of" comprehend all possible ways by which property may be separated or passed from the gross estate. Thus, money on hand at decedent's death which is thereafter used in the payment of the funeral expenses, or in settlement of claims against the estate, or is invested, falls within the term "otherwise disposed of."

The property to be valued as of one year after the date of decedent's death, or as of date of decedent's death, or as of some intermediate date, is the property included in the gross estate on the date of the decedent's death. As property and its value are separate and distinct, the former denoting legal rights, the latter the monetary measure of such rights, and as subdivision (j) treats of the two separately, it will be necessary in every case first to determine what property constituted the gross estate at decedent's death. Subdivisions of section 302, as amended, other than subdivision (j), supply the information necessary to that determination, subdivision (j) being, in the main, confined to the date or dates as at which the value is to be ascertained.

Interest-bearing obligations, such as bonds and notes, embody two promises, one to pay principal and the other to pay interest, and both promises are a part of the gross estate at the death of the decedent, if the obligation was then owned by him, or had been previously so transferred by him, or at his death there was vested in him any such right or power in or with respect to the obligation as to bring it within any of the other subdivisions of section 302, as amended. If the valuation date is that of decedent's death, the principal of the obligation and interest then accrued and unpaid thereon are to be valued as of that date. If the valuation date is subsequent to death, the principal and interest then accrued and unpaid are to be valued as of that date. The valuation date of any part payment of principal or of any installment of interest, made between decedent's death and the date as at which the obligation is to be valued, will be the date of such payment. Like rules will govern, so far as applicable, when any other obligation is involved, as, for example, one calling for the payment of rent or a royalty. Thus, in the case of rent, if the realty and the obligation to pay the rent reserved were parts of the gross estate at the time of decedent's death, the value of the former must be determined as of the applicable valuation date, and also the value of the rent then accrued and unpaid reserved by the latter. The valuation date of any rent paid in the interim pursuant to the rental obligation will be the date of its payment.

As in the case of bonds and notes, the interest accrued and unpaid upon a judgment on the date as of which the judgment is to be

valued is to be included in the valuation. The valuation date of any part payment of the judgment, or of any interest thereon (without regard to whether earned before or after decedent's death), made between decedent's death and the date as of which the judgment is to be valued, will be the date of such payment.

When corporate stock is a part of the gross estate at decedent's death, and a dividend in partial liquidation is thereafter paid on or before the date as of which the stock is to be valued, the valuation date of such dividend will be the date of its payment. Similarly, a dividend paid within the same period out of earnings, whether the earnings are made or accumulated prior or subsequent to decedent's death, will be valued as of the date of its payment. Earnings of the corporation neither declared as a dividend nor paid between decedent's death and the valuation date of the stock, will be reflected in the value of the stock. But a dividend declared prior to the valuation date of the stock and payable subsequent thereto will not be so reflected if the stock is selling "ex dividend" on such valuation date, but is to be valued as of that date.

Differing from payments of principal and interest in the case of bonds and notes, those made upon a judgment are not pursuant to a promise but to an obligation imposed by law, which obligation, in its totality, is a part of the gross estate at decedent's death if coming within any of the other subdivisions of section 302, as amended. So, too, liquidating dividends and dividends paid from earnings are not pursuant to a promise but are referable to legal rights inherent in stock ownership.

By way of illustrating the operation of subdivision (j), there is given the following example in which the death of the decedent will be taken to have occurred December 1, 1935:

Description	Valuation date	Value at valuation date	Value at date of death
Improved real estate—not disposed of within year following decedent's death	Dec. 1, 1936	$30,000	$35,000
Rents accrued but unpaid under lease antedating decedent's death	Dec. 1, 1936	900	500
Rent paid Jan. 1, 1936	Jan. 1, 1936	600	------
Bonds sold June 1, 1936	June 1, 1936	59,400	60,000
Interest accrued and unpaid thereon	June 1, 1936	400	400
Interest paid Apr. 1, 1936	Apr. 1, 1936	1,200	------
Corporate stock—distributed to legatee Nov. 1, 1936	Nov. 1, 1936	100,000	200,000
Cash dividend paid upon such stock Aug. 1, 1936	Aug. 1, 1936	100,000	------
Bonds matured and paid Oct. 1, 1936	Oct. 1, 1936	12,000	12,000
Interest accrued	------	------	80
Interest paid at maturity	Oct. 1, 1936	240	------
Interest paid Apr. 1, 1936	Apr. 1, 1936	240	------
Corporate stock—not disposed of within year following decedent's death, and upon which no dividend was paid in that period	Dec. 1, 1936	50,000	100,000
Total value of gross estate pursuant to the election	------	354,980	------
Total value of gross estate as of date of decedent's death	------	------	407,980

* * * * *

The election is available to the executor only at the time the return is filed, and only if the return is filed within 15 months from the decedent's death, or within the period of an extension of time for filing granted under the provisions of article 68 or 69 of these regulations. The election applies to all the property included in the gross estate on the date of the decedent's death. It cannot be applied only to a portion of such property. The election, if exercised, cannot be rescinded.

In every case where the election is exercised, the return, Form 706, must set forth (1) an itemized description of all property included in the gross estate on the date of the decedent's death, together with the value of each item as of that date, (2) an itemized disclosure of all distributions, sales, exchanges, and other dispositions of any of the property during the 1-year period after the decedent's death, together with the dates thereof, and (3) the value of each item of property determined in accordance with the provisions of subdivision (j). The amount of any income accrued and unpaid at the date of the decedent's death on each item of principal, the amount of any income collected or otherwise realized thereon after the decedent's death and prior to the date as of which the item of principal is to be valued, and the amount of any income accrued and unpaid thereon at such subsequent valuation date, shall be separately shown. All the information indicated by Form 706 must be supplied. Statements as to distributions, sales, exchanges, and other dispositions of the property within the 1-year period must be supported by evidence. If the court makes an order or decree of distribution during that period, a certified copy thereof must be submitted as part of the evidence. The Commissioner may require the submission of such additional evidence as is deemed necessary.

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JURISDICTION

The judgment of the Circuit Court of Appeals was entered on April 24, 1940 (R. 39). The petition for a writ of certiorari was filed July 23, 1940, and was granted October 14, 1940 (R. 42.) The

jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Section 302 (j) of the Revenue Act of 1926, as added by Section 202 (a) of the Revenue Act of 1935, gives the executor of an estate an option to have the value of the gross estate determined by valuing the property which is included therein on the date of decedent's death at its value as of the date one year after death; if any of the property is disposed of during the year after death, such property is to be valued at its value on the date of disposition. The question presented is whether rights to interest, rents, and dividends owned by a decedent at the date of his death are property of the estate within the meaning of this section.

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and Regulations involved are set forth in the Appendix, *infra*, pp. 64–75.

STATEMENT

This case was decided by the District Court (R. 17–25) on motion by the taxpayers (R. 15), and cross motion by the Collector (R. 16), for judgment on the pleadings. The material facts, as alleged in the complaint (R. 4–7), may be summarized as follows:

Ida H. Saks, the decedent, a resident of the City of New York, died on August 30, 1936 (R. 4). In

the federal estate tax return filed on behalf of her estate, the executors exercised the option, provided by Section 302 (j) of the Revenue Act of 1926, as added by Section 202 (a) of the Revenue Act of 1935, to have the value of all the property included in the estate on the date of the decedent's death determined as of the optional valuation date provided in the statute (R. 5).

Pursuant to Article 11 of Treasury Regulations 80, the Commissioner of Internal Revenue included in the amount of the decedent's gross estate the sum of $19,956.32, representing interest, rents and dividends earned by and upon the property and assets of the estate subsequent to the date of death of the decedent (R. 5, 12). The federal estate tax which was thereafter assessed on this basis was duly paid, and claim for refund was filed and rejected; thereafter the present suit was instituted (R. 4–7).

The District Court decided that the amount in question was properly included in valuing the decedent's gross estate (R. 17–24); its judgment was affirmed by the court below (R. 39).

SUMMARY OF ARGUMENT

Under Section 302 (j) of the Revenue Act of 1926, executors have the option of computing the value of decedent's gross estate by valuing the property which is included therein on the date of decendent's death at its value as of the date one year after death; if any property is disposed of

during the year after death, such property is to be valued at its value on the date of disposition. The issue in this case is whether certain income rights owned by the decedent at the time of his death and disposed of during the year after death in return for interest, rents and dividends, are property rights within the meaning of this provision. The Treasury has determined that they are (Article 11, Regulations 80), and its determination must, of course, be given effect unless plainly in conflict with the statute.

In our view, the Treasury Regulations properly construe the Congressional intent. The property to be valued under Section 302 (j) is only that property which is included in the gross estate at the time of death; conversely, *all* the property which is included in the gross estate at the time of death must be included in the valuation as of a year after death. Since the basic purpose of the option is to achieve a valuation, a year after death, reflecting the then value of the same elements of value which would be included if the estate were valued as of the date of death, it seems clear that "property included in the gross estate," as used in Section 302 (j), includes every right which would enter into the valuation of the gross estate if valued at the time of death.

Since only that property is to be valued under the optional valuation method which decedent

owned at death, petitioner is clearly correct in his contention that income received by the estate during the year after death, which plainly did not belong to the decedent at the time of his death, is not to be included in the gross estate for purposes of optional valuation. The Government's position is not that such income should be included, but rather that any *income rights* which decedent owned at his death, and which would be reflected as an element of value in his gross estate if valued at the time of death, must likewise be reflected as an element of value in the gross estate, if valued as of the year after death. And since it is clear, upon analysis, that each of the income rights of which this decedent died the owner was an element of value entering into the value of her gross estate at the time of death, it follows that each of them must likewise be valued for purposes of optional valuation.

If we are correct in this position, then it is plain that such of the income rights as were disposed of during the year after death must be valued as of the date of their disposition, and that their value on that date may be measured by the amount received for them, namely, the amount of the interest, rents, and dividends. Similarly, where income has accrued but has not been collected during the year after death, the value of the income rights retained in the estate may be measured by the amount of income accrued.

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A contrary conclusion would result in many logically and economically baseless distinctions. It would mean, for example, that increases in the value of an estate due to accumulated corporate earnings, which are reflected in an increased value for the stock, would be included in the value of the gross estate, while increases in value due to distributed corporate earnings would be excluded. It would mean, similarly, that increases in the value of securities such as United States Savings Bonds would be included in the value of the gross estate, while increases in the value of comparable interest-bearing bonds would be excluded. And it would mean the inclusion in the value of the gross estate of income realized in the form of capital gains, but the exclusion of income realized in the form of interest, rents, and dividends.

Furthermore, acceptance of petitioner's position would allow executors in many cases to write a large part of their own tax bill by the simple device of selling the coupons attached to decedent's bonds, or making an assignment of rents due in the future under a lease, or causing a corporation in which the decedent owned stock to declare extraordinary dividends. If any of these things were done, the actual value of the estate would remain substantially unaffected, yet under petitioner's construction of the statute the taxable value of the estate would be greatly reduced. We believe it clear that Congress did not intend Section 302 (j) to be so construed.

The purpose of the section, as shown by its legislative history, was to alleviate the hardship presented when a decedent died in a time of rapidly falling markets and when, therefore, the value of the estate at the date of death was much greater than the value of the assets available for distribution at the end of the period of administration. At every stage of the legislative process, the emphasis was on the need for allowing the executor to value the estate at what it was actually worth when it became available for distribution rather than at the unrealizable values which existed only at the time of the decedent's death. The extent of the relief afforded by Section 302 (j) must be measured in terms of this need. Alleviation of the hardship obviously calls for no more than disregarding those values which, at the time of distribution, are no longer accessible; it neither requires nor justifies disregarding values which are in fact accessible. As the court below pointed out (R. 35), if executors "are not to be assessed upon what is practically beyond their reach, they should certainly be compelled to accept in its stead the total of what is practically within it."

It is significant that the enactment of the Revenue Act of 1935, which added the optional valuation provision to the estate tax law, was motivated by the need for greatly increased revenues, and that it provided for a very substantial increase in the estate-tax rates as well as for a reduction in the

amount of the specific exemption allowed. It is highly unreasonable to assume that in the same measure by which Congress sought to raise large additional sums for the federal Treasury, it also intended to grant to certain taxpayers a windfall of millions of dollars by giving them, in a relief provision, a tax reduction unrelated to the need sought to be relieved.

ARGUMENT

THE RIGHTS TO RECEIVE INTEREST, RENTS, AND DIVIDENDS ARE RIGHTS OF PROPERTY CONSTITUTING A PART OF THE GROSS ESTATE OF THE DECEDENT AT THE DATE OF HIS DEATH AND THEY MUST THEREFORE BE INCLUDED WITHIN THE GROSS ESTATE UNDER THE OPTIONAL VALUATION METHOD.

1. Applicable Statute and Regulations

Section 302 (j) of the Revenue Act of 1926, as added by Section 202 (a) of the Revenue Act of 1935, provides as follows:

> If the executor so elects upon his return * * *, the value of the gross estate shall be determined by valuing all the property included therein on the date of the decedent's death as of the date one year after the decedent's death, except that (1) property included in the gross estate on the date of death and, within one year after the decedent's death, distributed by the executor (or, in the case of property included in the gross estate under subdivision (c), (d), or (f) of this section, distributed by the trustee under

> the instrument of transfer); or sold, exchanged, or otherwise disposed of, shall be included at its value as of the time of such distribution, sale, exchange, or other disposition, whichever first occurs, instead of its value as of the date one year after the decedent's death * * *[1]

This section, as its legislative history shows (*infra*, pp. 42–45), was a by-product of the depression. It was intended to alleviate the hardship presented when a decedent died in a time of rapidly falling markets and when, therefore, the value of the estate at the date of death was much greater than the value of the assets at the end of the period of administration. In such a situation, an estate tax based upon values which existed only at the time of decedent's death might represent an undue proportion of the value of the assets actually avail-

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[1] The further provision of the statute that "any interest or estate which is affected by mere lapse of time shall be included at its value as of the time of death (instead of the later date) with adjustment for any difference in its value as of the later date not due to mere lapse of time" is not applicable to the situation here presented. The legislative history of the statute shows that this provision is confined in its application to patents, leaseholds, remainders, and other interests terminating upon the expiration of a period of time. See H. Rep. 708, 72d Cong., 1st Sess., p. 51, a report on a bill (enacted as the Revenue Act of 1932) containing a provision similar to Section 302 (j). Although this provision was not then enacted into law, it served as the basis for the subsequent enactment of Section 302 (j). The Committee reports on the 1935 Act throw no further light on the meaning of the "lapse of time" provision.

able for distribution. Accordingly, Congress gave executors the option of valuing the property included in the estate on the date of death, either as of the date of death or as of the date a year after death, the period of a year being considered the average time necessary for the administration of the estate.

The issue in this case is whether certain income rights owned by the decedent at the time of his death and disposed of during the year after death in return for interest, rents and dividends, are property rights within the meaning of Section 302 (j) which must be included in the gross estate under the optional valuation metho . Article 11 of Treasury Regulations 80 requires their inclusion and specifies at some length the reasons therefor:

> The property to be valued as of one year after the date of decedent's death, or as of date of decedent's death, or as of some intermediate date, is the property included in the gross estate on the date of the decedent's death. As property and its value are separate and distinct, the former denoting legal rights, the latter the monetary measure of such rights, and as subdivision (j) treats of the two separately, it will be necessary in every case first to determine what property constituted the gross estate at decedent's death. * * *
>
> Interest-bearing obligations, such as bonds and notes, embody two promises, one to pay principal and the other to pay inter-

est, and both promises are a part of the gross estate at the death of the decedent, if the obligation was then owned by him * * *. If the valuation date is that of decedent's death, the principal of the obligation and interest then accrued and unpaid thereon are to be valued as of that date. If the valuation date is subsequent to death, the principal and interest then accrued and unpaid are to be valued as of that date. The valuation date of any part payment of principal or of any installment of interest, made between decedent's death and the date as at which the obligation is to be valued, will be the date of such payment. Like rules will govern, so far as applicable, when any other obligation is involved, as, for example, one calling for the payment of rent or a royalty. Thus, in the case of rent, if the realty and the obligation to pay the rent reserved were parts of the gross estate at the time of decedent's death, the value of the former must be determined as of the applicable valuation date, and also the value of the rent then accrued and unpaid reserved by the latter. The valuation date of any rent paid in the interim pursuant to the rental obligation will be the date of its payment.

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When corporate stock is a part of the gross estate at decedent's death, and a divi-

> dend in partial liquidation is thereafter paid on or before the date as of which the stock is to be valued, the valuation date of such dividend will be the date of its payment. Similarly, a dividend paid within the same period out of earnings, whether the earnings are made or accumulated prior or subsequent to decedent's death, will be valued as of the date of its payment. Earnings of the corporation neither declared as a dividend nor paid between decedent's death and the valuation date of the stock, will be reflected in the value of the stock. But a dividend declared prior to the valuation date of the stock and payable subsequent thereto will not be so reflected if the stock is selling "ex dividend" on such valuation date, but is to be valued as of that date.

The interpretation thus placed on Section 302 (j) by the agency charged with its administration must, of course, be given effect by the courts, unless the Regulation is plainly in conflict with the statute. *Koshland* v. *Helvering*, 298 U. S. 441, 446; *Brewster* v. *Gage*, 280 U. S. 327, 336; *Maryland Casualty Co.* v. *United States*, 251 U. S. 342, 349; *Fawcus Machine Co.* v. *United States*, 282 U. S. 375; *United States* v. *Hermanos y Compañia*, 209 U. S. 337, 339. Petitioner's contention that the Regulation is "in essence a partisan argument" (Br. 38) reveals an astonishing misconception of the nature and function of regulations. The Treasury is charged by law with the duty of administering the Revenue Acts as enacted by Congress;

consequently, no considered interpretation of the Act by the Treasury can be treated as "partisan argument." To the contrary, every interpretative regulation expresses the best opinion of the tax experts of the Government as to the meaning of the statutory language employed by Congress; the opinion thus expressed is "entitled to respectful consideration, and will not be overruled except for weighty reasons." *Fawcus Machine Co.* v. *United States,* 282 U. S. 375, 378; *Brewster* v. *Gage,* 280 U. S. 327, 336. The fact that the Regulation is not of long standing is immaterial; an administrative ruling "has peculiar weight when it involves a contemporaneous construction of the statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Co.* v. *United States,* 288 U. S. 294, 315. In our view, the Regulation here involved, far from being clearly in conflict with the statute, expresses the evident intent of Congress.[2]

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[2] Section 302 (j) became effective August 30, 1935. The provision of the present Article 11 of Regulations 80 was promulgated as "Article 13½, Optional valuation date" in T. D. 4699, XV–2 Cum. Bull. 293, and was approved September 25, 1936. The record does not show precisely when petitioner filed the estate tax return, but it must have been after promulgation of the Regulation, since decedent died on August 30, 1936 (R. 4). The return was probably not filed until on or around November 30, 1937, when the first payment of the tax was made (R. 5–6).

2. The Basic Issue

The fundamental question presented for determination is the meaning of the words "property included in the gross estate" as used in Section 302 (j). The statute does not define "property"; of gross estate, it says merely that the value of the gross estate shall be determined by including the value of "all property, real or personal, tangible or intangible" owned by the decedent at the time of his death (Sec. 302). The word "property" is, of course, one of many facets: in some connections it may be taken to mean simply the physical object to which various legal rights and privileges relate; in other connections, it may denote the aggregate of legal relations appertaining to a physical object. See Hohfeld, *Fundamental Legal Conceptions* (1923) 28. Its meaning in any particular connection must be ascertained by examination of the context in which it is found and, as used in a taxing statute, by analysis of the statutory scheme of taxation.

The scheme of taxation envisaged by Section 302 (j) is clear. The property to be valued as of the year after death is only that property which is included in the gross estate at the time of death; conversely, *all* the property which is included in the gross estate at the time of death must be included in the valuation as of a year after death. Since the basic purpose of the option is to achieve a valuation, a year after death, reflecting the then

value of the same elements of value which would be included if the estate were valued as of the date of death, we believe it apparent that "property included in the gross estate", as used in Section 302 (j), includes every right which would enter into the valuation of the gross estate if valued at the time of death. Cf. *Townsend* v. *Ashepoo Fertilizer Co.*, 212 Fed. 97, 101 (C. C. A. 4th), and *Samet* v. *Farmers' & Merchants' Nat. Bank*, 247 Fed. 669, 671 (C. C. A. 4th), both of which were cited with approval by this Court in *Burnet* v. *Houston*, 283 U. S. 223, 226–227. Under any other construction of the word "property", fewer elements of value would be appraised under the optional valuation method than were part of decedent's property at death; this would appear to be contrary to the plain intent of Congress to include in gross estate precisely the same elements of value under either method of valuation.

Since only that property is to be valued under the optional valuation method which decedent owned at death, petitioner is clearly correct in his contention that income received by the estate during the year after death, which plainly did not belong to the decedent at the time of this death, is not to be included in the gross estate for purposes of optional valuation. The Government has never contended that such income should be included in the gross estate. Its position is simply that any

income rights which decedent owned at his death, and which would be reflected as an element of value in his gross estate if valued at the time of death, must likewise be reflected as an element of value in the gross estate, if valued as of the year after death. And if, as in this case, one of those income rights (e. g., a coupon attached to a bond) is disposed of during the year after death, the value of the income right disposed of must be taken at its value on the date of disposition; that value will normally be the amount received in return for the income right—in the case of a coupon, the amount of interest paid.[3]

Petitioner misses the point completely in his discussion of the nature of capital and income (Br. 16–20). The Government recognizes, of course, that interest, rents, and dividends received by the estate during the year after death

[3] That the discharge of an obligation through payment at maturity constitutes a "disposition" of that obligation within the meaning of Section 302 (j) is plain. The Conference Committee report on the bill which became the Revenue Act of 1935 (H. Rep. 1885, 74th Cong., 1st Sess., pp. 10–11) gave an illustration of the manner in which Section 302 (j) was expected to operate. A hypothetical case was given in which a decedent died, owning, among other assets, foreign bonds of a face value of $10,000, but of a value as of the date of death of $9,550. Those bonds matured nine months after the date of death and were paid in full at maturity. The report states that under the optional valuation method, the foreign bonds should be reported as follows: "Foreign bonds (as of the date of disposition, i. e., maturity) . . . $10,000."

are income to the estate and, as such, may not be taxed as part of the gross estate; the Government urges merely that the income may be used as a measure of the value of the income rights owned by the decedent at the time of his death.

So far as the income rights themselves are concerned, it is not important that, from an income tax accounting point of view, they are not regarded as separable capital assets. Section 302 relates to "property," not to "capital," and income tax concepts of capital are therefore not relevant. There are many assets which a taxpayer may own which are not treated as his capital from an income tax accounting point of view and which yet are plainly his property; similarly there are assets which an executor may acquire from the decedent which are not treated as capital of the estate from an income tax standpoint and yet which, under the optional valuation method, must be treated as property of the decedent. To take a simple illustration, assume that a taxpayer purchases a share of stock for $100, that it increases in value to $150 by the time he dies, and that it is sold by his executor six months after his death for $200. From an income tax standpoint, the capital investment of the taxpayer in the stock is only $100, yet the stock must be included in gross estate, as his property, either at $150, if the estate is valued at the date of death, or at $200 if the optional valuation method is used. So far as the executor is concerned, his "capital"

for income tax purposes is $150 (Section 113 (a) (5)) and he therefore realizes taxable income when he sells the stock for $200. Yet, if the optional valuation method is used, the stock is includable in gross estate at $200. Plainly, therefore, the "property" to be included in gross estate under Section 302 is something different from the concept of "capital" employed in income tax accounting.

Another illustration which may be suggested is the case of a contested claim owned by the decedent at the time of his death. In *United States* v. *Safety Car Heating Co.*, 297 U. S. 88, this Court held that such a claim is not "property that has been transmuted into capital" from an income tax standpoint. 297 U. S. at 97. Yet we believe it clear that, to the extent that the claim is an asset of value which is assignable for a valuable consideration, it is "property" includible in the gross estate under Section 302 (j). Cf. *Burnet* v. *Houston*, 283 U. S. 223, 226.

The basic issue here, therefore, is not whether the income rights are capital assets. Even though they are not capital assets from an income tax accounting point of view, if they are elements of value which enter into the valuation of the gross estate when valued at the time of death, they must also be considered part of the gross estate for purposes of optional valuation. In the succeeding sec-

tions of this brief we show that the right to interest (whether in the form of separate coupons or as an inseparable part of the obligation contained in a bond or note), the right to rental payments contained in a lease, and the right to dividends attaching to stock ownership, are income rights which are elements of value entering into the value of decedent's gross estate at the time of his death, and which must, therefore, likewise be valued for purposes of optional valuation. If we are correct in this position, then it is plain that such of the income rights as were disposed of during the year after death must be valued as of the date of their disposition, and that their value on that date may be measured by the amount received for them, namely, the amount of the interest, rents, and dividends. Similarly, when income has accrued but has not been collected during the year after death, the value of the income rights retained in the estate may be measured by the amount of income accrued.

3. The Right to Interest is a Property Right Within the Meaning of Section 302 (j)

A. *Coupon bonds.*—The validity of the Regulation may be most readily demonstrated by considering the rights owned by a decedent in a coupon bond. As this Court recently had occasion to observe, "The holder of a coupon bond is the owner of two independent and separable kinds of right. One is the right to demand and receive at maturity

the principal amount of the bond representing a capital investment. The other is the right to demand and receive interim payments of interest on the investment in the amounts and on the dates specified by the coupons." *Helvering* v. *Horst*, No. 27, present Term, decided November 25, 1940. Both majority and dissenting opinions in the *Horst* case recognize that the holder of a coupon bond, by the transfer of an unmatured coupon without consideration, makes a valuable gift; the making of such a gift, of course, implies the transfer of property or of a property right. This conclusion is implicit, too, in the earlier decision in *Nesbit* v. *Riverside Independent District*, 144 U. S. 610, 619, where the Court pointed out that "while the promises of the bond and of the coupons in the first instance are upon the same paper, and the coupons are for interest due upon the bond, yet the promise to pay the coupon is as distinct from that to pay the bond, as though the two promises were placed in different instruments, upon different paper." See also *Edwards* v. *Bates County*, 163 U. S. 269.

These decisions are but illustrations of what would in any event be clear, that an interest-bearing bond is simply a series of promises to pay installments of money in the future. All of the promises are separate obligations—so far separate that the obligee may bring successive actions upon them. *Nesbit* v. *Riverside Independent District supra; Edwards* v. *Bates County, supra.* In the

case of a coupon bond, each coupon is also separately negotiable for a valuable consideration, proving that, in and of itself, it is a valuable asset of the holder. It is immaterial that, for convenience, all the promises may be grouped together in a single piece of paper and may pass from hand to hand as such. The important fact, as the court below pointed out (R. 32), is that the value of the bond is the aggregate value of all the promises, both interest and principal, each promise being discounted for the interval before its performance is due, as well as for any doubts as to the obligor's responsibility. Since the value of the coupons is included in the value of the bond, it is clear that the income rights represented by the coupons are elements of value included in decedent's gross estate at his death and that they must, therefore, be included in his gross estate under the optional valuation method.

This may be graphically illustrated by assuming that a decedent dies on January 1, 1940, owning a $1,000 bond having a market value of $1,000 (exclusive of accrued interest), the bond being due in 1960, with interest payable at 5 percent semiannually on February 1 and August 1. It is perfectly plain that, on January 1, 1940, the obligation to pay the principal of $1,000 in 1960 is not worth $1,000; what makes the bond worth that amount is the obligation to pay interest periodically together with the obligation to pay the principal at ma-

turity.[4] If the February 1, 1940, coupon were missing from the bond, the bond would be worth less than $1,000 by an amount equal to the discounted value of the missing coupon. It is apparent, therefore, that the value of the bond—$1,000, plus accrued interest—which would have to be included in the value of the gross estate. if valued as of the date of death, includes the value of all the income rights attached to the bond, i. e., the coupons. And the fact that the value of the coupons would have to be included in the gross estate if valued as of the date of death demonstrates conclusively that the coupons are part of the "property" which decedent owned at death, within the meaning of Section 302.

If the optional valuation method is used, precisely the same property must be included in the value of the gross estate. On January 1, 1940, the February 1 and August 1 coupons were income rights owned by the decedent which were of value and which were part of the value of his gross estate. During the year, those income rights were disposed of in return for interest, their value at the date of disposition being the amount of interest received. To exclude from gross estate for purposes of optional valuation the value of those

[4] This is strikingly illustrated by the provision commonly found in corporate bonds giving the company a right to redeem the bonds *at a premium* prior to maturity. The premium is simply consideration for the cancellation of the company's obligation to pay interest to maturity.

rights on the date of their disposition would be to include fewer elements of value, i. e., less property, in gross estate under the optional valuation method than would have been included if the gross estate had been valued as of the date of death. This would be in plain violation of the statutory mandate that the same elements of value be included under either method of valuation.

The result is the same if the executors, instead of presenting the February 1 and August 1, 1940, coupons, placed the bond, with all coupons attached, in a safe deposit box and did not touch it until a year after death. All the property rights in the bond of which decedent died the owner are, of course, represented by the piece of paper placed in the box. A year later, assuming a constant market, that same piece of paper would have increased in value by the amount of the interest coupons which had matured. Since the piece of paper represents the same property rights a year after death as it represented at the time of death, and since the piece of paper has increased in value, it is evident that there has been an increase in the value of the property rights owned by the decedent at the time of his death.

The same conclusion is reached if we approach the question by examining the situation of a decedent who dies owning merely an unmatured coupon which the holder of a bond had previously transferred to him. Plainly that coupon would

be property of the decedent and would have to be included in the value of his gross estate, whether valued as of the date of death or under the optional valuation method. If the latter method is adopted and the coupon matures and is presented for payment during the year after death, the coupon would obviously have to be included in the gross estate at its value on the date of its disposition, which would be the amount of the payment received. It can, of course, make no difference in interpreting the word "property", as used in Section 302 (j), whether the coupon is owned by the holder of the bond or by another; if it is "property" in the one case, it must be "property" in the other.

The conclusion is inescapable, therefore, that the income right represented by a coupon of which a decedent dies the owner is a property right and that, as such, its value must be included in decedent's gross estate whichever method of valuation is used.

The petitioners in *Abendroth* v. *Commissioner* and *Blacque* v. *Commissioner*, Nos. 510 and 511, present Term—cases which involve precisely the same issue as this case and which are to be argued together with this case—in effect admit the validity of our position by stating (Br. 40–41):

> It is said that the executor may sell all the coupons from the estate's bonds, so that one year after death the bonds will have lost a great part of their value, and that an un-

> fair advantage would be obtained by the estate if the proceeds were not added to the estate in arriving at the value one year after death. The answer is obvious. *Selling off coupons in advance of their maturity would materially alter the bonds; the mutilated bonds left in the estate would not be the same assets as the bonds owned at the date of death with all unmatured coupons attached.* For example, they would not be good delivery against a contract to sell the original bonds. *It seems clear that the original bonds would have to be valued at the date of such mutilation.* [Italics supplied.]

They then attempt to draw a distinction between such a case and the collection of coupons "in regular course as they mature" by alleging that, in the latter situation, the bond "remains what it always was, a bond with all unmatured coupons attached" (Br. 41).

The admission that selling the coupons in advance of their maturity would "materially alter the bonds" and that the bonds without the coupons "would not be the same assets as the bonds owned at the date of death" recognizes, of course, that the bondholders' right to interest, represented by the coupons, is an element of value which is an essential part of his property and the value of which is reflected in the value of his property. If, in the case of a sale of the coupons, the bond would have to be valued at the date of such sale, as these petitioners suggest, it must only be because the sale

constitutes a partial disposition of the decedent's property.

For purposes of determining the property rights which decedent owned at his death, it seems to us immaterial whether the executor disposes of all the coupons attached to a bond or of only those coupons which mature. If all the unmatured coupons together are property of the decedent at his death, as these petitioners in effect admit, then each unmatured coupon must likewise be his property. And if an unmatured coupon is property, it is not the less property when it matures and is disposed of in return for an interest payment.

The fact, stressed by these petitioners, that after the disposition of the matured coupon the bond still has all the unmatured coupons attached is immaterial; the property of the decedent at his death, which is the property to be valued, is the bond with all of the *then* unmatured coupons attached. This, of course, includes all coupons which mature during the year after death.

B. *Other interest-bearing obligations.*—Coupon bonds have been separately treated only because they present the most graphic demonstration of the validity of the Regulation; it is evident, however, that the same principles which govern the case of coupon bonds are likewise applicable to the case of other interest-bearing obligations. Whether the provision for interest is contained in coupons attached to the bond or is embodied in the bond

itself, it is still true that the bond is simply a series of promises to pay installments of money in the future and that the promises are separate obligations, on which the obligee may bring successive actions. In the case of the coupon bond, the promise to pay interest is in the form of a negotiable instrument; although this is not true of other types of obligations, the promise to pay interest contained in such obligations is nonetheless separately assignable for a valuable consideration, proving that, in and of itself, it is a valuable asset.

As in the case of coupon bonds, the promise to pay interest contained in all interest-bearing obligations is an element of value which is included in the value of the obligation at the decedent's death. A $1,000 note, payable in 20 years, is worth $1,000 at the decedent's death only because of the promise it contains to pay interest during the period before maturity. Since the note would have to be included in decedent's gross estate, if valued at the time of his death, at $1,000, it is plain that the value of the gross estate at the time of death includes the value of the income right. This being true, it follows that the income right must likewise be included in the gross estate under the optional valuation method, and, if there is a partial disposition of the income right during the year after death through the receipt of interest, the value of the right disposed of must be included at its value on the date of disposition. This value,

of course, may be measured by the amount of interest received.

As in the case of coupon bonds, if a noncoupon bond owned by a decedent is left untouched in a safe-deposit box for the year after death, the same piece of paper placed in the box would be worth more at the end of the year than it was worth at the time of the decedent's death by the amount of interest due thereon, assuming a constant market. Since all the property rights owned by the decedent in the bond at the time of his death are evidenced by the piece of paper and since the same piece of paper is worth more at the end of the year, it is apparent that the property rights in the estate at the time of death have increased in value by the amount of the interest accrued.

It is pertinent to inquire how petitioner would reconcile his position that income rights on bonds should not be included in gross estate for purposes of optional valuation with the treatment necessarily accorded under the statute to the enhancement in value of United States Savings Bonds. These Savings Bonds, as the Court knows, do not carry a promise to pay interest, but instead provide for an increased cash surrender value at the end of each year and for the payment at the end of ten years of an amount which is larger by one-third than the amount paid for the bonds upon their issuance. It is obvious that if the decedent owned a Savings Bond at the time of his death, the increase in the value of

that bond during the year after death would be reflected in the value of the decedent's gross estate under the optional valuation method. Yet that increase in value is, of course, simply the economic counterpart of accrued interest.[5] Thus, petitioner's theory would free from estate taxation an increase in value of the estate due to interest paid, while subjecting to estate taxation an increase in value due to interest accrued. A distinction so logically and economically baseless should certainly not be read into the statute unless the statutory language expressly requires it.

To hold that the income right represented by the obligation to pay interest on a bond is not to be included in gross estate for purposes of optional valuation would be to open a wide door to tax avoidance. The executor of an estate which includes, for example, an interest-bearing note with a three-year maturity might very easily be able to bargain with the obligor for an advance payment of interest for the entire remaining period, in return for the granting of a discount. If this were done, the obligation, as of a year from the date of death, would be of substantially less value than it was at the date of death, even though the value of the promise to pay the principal at maturity remained constant. Thus, petitioner's interpretation of Section 302 (j)

[5] If a Savings Bond is held until maturity, the increase on the original investment is equivalent to annual interest of 2.9% compounded semiannually.

would permit use of the optional valuation method, not only to reflect a shrinkage in value of assets due to a market decline, but also entirely to avoid estate taxation on elements of value which were part of decedent's gross estate at the time of his death. It is evident, we believe, that Congress had no such intent.

4. The Right to Rental Payments Under a Lease is a Property Right Within the Meaning of Section 302 (j)

The record is silent as to the nature of the property owned by the decedent on which the estate received rents during the year after death; in the absence of other proof, the assumption may properly be made that at the time of his death decedent owned real estate subject to a lease for a period of years, the lease providing for stipulated yearly rental payments. The right to those rental payments is, we believe, a property right owned by the decedent at the time of his death, which would be included in the value of his gross estate if valued at the time of death, and which must, therefore, be included in gross estate under the optional valuation method. If this be so, the income right disposed of during the year after death in return for the rental payment must be included in gross estate at its value on the date of disposition, which would be measured by the amount of rent received.

If a decedent dies owning real property subject to a lease, he obviously owns more than an estate in reversion; he owns in addition a valuable contract

right, his interest in the lease. That interest is a valuable asset, its value to the decedent normally being the value of the obligation to pay rent. The amount of rent provided for in the lease, i. e., the value of the income rights owned by the lessor, clearly affects the value of decedent's estate; if the lease is favorable, it increases the value of the estate, while if unfavorable the value of the estate decreases. It follows that the value of the property rights owned by decedent is dependent both upon the value of the income rights during the term of the lease and upon the estimated value of the land at the termination of the lease. The income rights under the lease are, of course, assignable for a valuable consideration, proving that in and of themselves they are a valuable asset; if there has been such an assignment of rents, the value of the property retained by decedent at the time of his death is obviously only the value of the reversionary estate.

It is evident, therefore, that in every case where a decedent owns real property subject to a lease and has made no assignment of rents, the value of the property which must be included in gross estate, if valued as of the date of death, includes the value of the income rights under the lease. Those income rights are consequently property rights within the meaning of Section 302 and their value must also be included under the optional valuation method. As of a year after death, there has been

a partial disposition of those property rights through the receipt of rent; if the value of the gross estate is computed without reference to the value of the rights disposed of, fewer elements of value would be included in the gross estate under the optional valuation method than would be included if the estate were valued as of the date of death, in plain violation of the statute.

Adoption of petitioner's theory would provide a facile method of tax avoidance in the case of rents as in the case of bonds. The executor might easily be able to arrange to have the lessee pay the rent for a number of years in advance in return for a discount, or he might make an assignment of those rents for a valuable consideration. The actual value of the estate would not be materially affected by this action, yet petitioner would have the Court hold that the value of the estate subject to taxation was affected. An interpretation of the statute which leads to such a result should plainly be avoided.

5. The Right to Dividends Attaching to Stock Ownership is a Property Right Within the Meaning of Section 302 (j)

As the court below recognized (R. 33), the right to dividends raises a somewhat more difficult question than the rights to interest and rent discussed above. Unlike a bondholder or lessor, a stockholder does not own an obligation providing for fixed payments to him at designated intervals; a definite obligation to pay dividends arises only

after the dividend has been declared by the Board of Directors of the corporation. But, in our view, this difference is not material. The determinative fact is that when a decedent dies owning stock, he owns a right to dividends, as and when declared, which, although not a chose in action, is nonetheless an element of value which affects and enters into the value of the stock and which would, therefore, be included in the value of the gross estate if valued as of the date of death. Consequently, it is a property right within the meaning of Section 302 (j) and must be included in the value of gross estate under the optional valuation method. This being true, any dividends received during the year after death may, of course, be used as a measure of the value of the dividend right owned by the decedent.

The relation between a corporation and its stockholders is contractual in nature. See Fletcher, Cyclopedia of Corporations, Vol. 11, Sec. 5083 and cases cited; *Jermain* v. *Lake Shore & Mich. So. Ry. Co.,* 91 N. Y. 483–494; *Geiger* v. *American Seeding Mach. Co.,* 124 Ohio St. 222, 177 N. E. 594, 599; *Crimmins & Peirce Co.* v. *Kidder, Peabody Accept. Corp.,* 292 Mass. 367, 375; 185 N. E. 383, 386; *State* v. *First Bank Stock Corp.,* 197 Minn. 544, 547, 267 N. W. 519, 521; *Voight* v. *Remick,* 260 Mich. 198, 204, 244 N. W. 446, 449; *Kennedy* v. *Central Power Co.,* 129 Neb. 637, 262 N. W. 504. By virtue of this contractual relation, the stock-

holder enjoys several rights, the aggregate value of which represents the value of the stock; the principal rights enjoyed are the right to participate in the surplus profits of the corporation on their division and, on the dissolution of the corporation, to participate in the assets remaining after the payment of the corporation's debts. See Fletcher, *supra*, and cases cited; see also *In re Wallace's Estate*, 131 Ore. 597, 282 Pac. 760, 761; *Bijur* v. *Standard Distilling Co.*, 74 N. J. Eq. 546, 556–557; *Intermountain Building & Loan Ass'n* v. *Gallegos*, 78 F. (2d) 972 (C. C. A. 9th). The right to participate in the surplus profits of the corporation, i. e., the right to dividends, is plainly a valuable asset of the stockholder. Indeed, in the normal case, the existence of the right to dividends is the motivating force for the investment in the stock, and the market value of the stock depends in large part upon the estimated value of the dividend right. If the stockholder assigns to another his right to dividends for a specified period[6] the value of his remaining interest in the

[6] That the right to dividends is separately assignable is established. *Homestake Oil Co.* v. *Rigler*, 39 F. (2d) 40 (C. C. A. 9th); *Bettendorf* v. *Commissioner*, 49 F. (2d) 173 (C. C. A. 8th); *Onondaga Trust & Deposit Co.* v. *Price*, 87 N. Y. 542, 547, 549; *Segerstrom* v. *Holland Piano Mfg. Co.*, 142 Minn. 104, 105; *Matter of Brenner*, 169 N. Y. Misc. 412, affirmed per curiam, 256 N. Y. App. Div. 1064; *Kaufman* v. *Charlottesville Woolen Mills*, 93 Va. 673; *Lancaster Trust Co.* v. *Mason*, 152 N. C. 660; *Matter of Loomis*, 149 N. Y.

stock would be materially decreased, proving that the right in and of itself is an element of value. Cf. *In re Wallace's Estate, supra.* And certainly no one would deny that the assignee of the right is the owner of a valuable asset.

The fact that, before the declaration of the dividend, the dividend right is not a chose in action and the amount of the dividend to be paid is uncertain is not material. It is true that this fact may affect the value of the right; as in the case of any right the enjoyment of which is dependent on a condition precedent, the value of the dividend right depends upon the likelihood of the condition precedent occurring as well as upon the amount to be received if the condition precedent does occur. The existence of the condition precedent, however, does not deprive the right of its character as an asset; the stockholder still enjoys the right to the dividend as and when declared. See e. g., *Jermain* v. *Lake Shore & Mich., So. Ry. Co., supra,* at 494; cf. *Burnet* v. *Houston,* 283 U. S. 223, 226; *Nelson* v. *Ferguson,* 56 F. (2d) 121, 124 (C. C. A. 3d).

Petitioner's argument with respect to dividends is based on the premise that a stockholder has no present right in the future earnings of the corporation. This premise is no doubt true, just as it

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Misc. 417, 421; cf. *Mandel* v. *North Hudson Inv. Co.,* 114 N. J. Eq. 336; *Guarantee Co. of North America* v. *East Rome Town Co.,* 96 Ga. 511.

is also true that the stockholder has no present right in the accumulated earnings of the corporation or in the capital assets of the corporation.[7] But that is beside the point. Ownership of stock, which is admittedly property, never carrys with it ownership of the corporate property or income; as pointed out in a searching opinion by Surrogate Delehanty analyzing the nature of stock (*Matter of Brenner,* 169 N. Y. Misc. 412, 416, 417, affirmed per curiam, 256 N. Y. App. Div. 1064), the property of the stockholder consists merely of "a collection of rights which he has toward certain earnings and capital *all* of which is owned by the corporation. Not only does the corporation own its earnings before declaration of a dividend but it also owns the capital." It is, therefore, fallacious to consider "that as to the corporate capital symbolized by a share of stock the holder has a more direct ownership than he enjoys in respect to individual profits" (*id.*).

As this opinion shows, the "property" represented by a share of stock is not a property right in corporate assets or earnings; it is rather in the nature of a contractual right of participation in profits and capital upon distribution. The right

[7] It is, of course, elementary that the property of the shareholders in their respective shares is distinct from the corporate property. *Van Allen* v. *Assessors*, 3 Wall. 573, 584; *New Orleans* v. *Houston*, 119 U. S. 265, 277; *Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 146; *Hawley* v. *City of Malden*, 232 U. S. 1, 9.

to participate in the distribution of profits, i. e., the right to dividends, is of precisely the same nature as the right to participate in the distribution of capital.[8] If one is property, the other must also be property. And if, as is admitted, both rights together are property, then each constituent right must also be considered as a property right. See, e. g., *Bijur* v. *Standard Distilling Co.*, 74 N. Y. Eq. 546, 556–557; *Matter of Loomis*, 149 N. Y. Misc. 417, 421; cf. *Burnet* v. *Houston, supra; In re Wallace's Estate, supra.*

The point may be illustrated by assuming that at decedent's death he owns stock in the X corporation, having a market value of $100 per share. The X corporation has $100,000 capital and $100,000 earned surplus, of which $50,000 is available for distribution and is actually distributed during the year after decedent's death. It is apparent that, at decedent's death, the market value of the stock, $100 per share, reflects the value of the stockholder's right to participate, whether through dividend payments or on dissolution, in both the capital and surplus of the corporation, as well as the market's appraisal of the future prospects of the company. After the $50,000 dividend payment is made, the value of the stockholder's right to participate is

[8] This is perhaps most graphically illustrated by the case of a corporation owning wasting assets where each dividend represents a distribution of both capital and profits and where there are generally no assets remaining for distribution upon dissolution.

pro tanto reduced. To value the stock as of the year after death without including the dividend payment would, therefore, be to include fewer elements of value under the optional valuation method than would have been included if the estate had been valued as of the date of death. We believe it evident that Congress did not intend Section 302 (j) to be so applied and yet, if petitioner's construction of the statute be accepted, every dividend paid during the year after death, even though from earnings accumulated prior to the date of death, would be excluded from the measure of the value of the gross estate.

The conclusion flowing from the foregoing analysis that the right to dividends is a property right owned by the decedent which must be valued under the optional valuation method is also supported by various practical considerations. It is not disputed that if the corporation earns net profits during the year after death which it does not distribute, the increase in the value of the stock due to those earnings would be included in the gross estate under the optional valuation method. Petitioner's theory, therefore, assumes that Congress intended the amount of the tax on the estate to be dependent upon whether the corporation does or does not distribute its earnings. This, of course, is completely illogical. The value of the assets in the estate is the same whether the earnings of the corporation are accumulated or distributed and

the amount of the tax on the estate should, therefore, be the same in either case.

If the corporation sustains a loss during the year after death, the value of the stock would shrink and the tax liability of the estate would be proportionately less. If, on the other hand, the corporation makes a profit which it retains, the value of the stock would increase and the tax liability of the estate would be proportionately greater. There is no reason in principle why a different result should be reached if the increase in the value of the estate is represented by dividend payments rather than by an increase in the value of the stock; in both situations, it is the profits of the corporation which increase the value of the estate by virtue of the property rights of which the decedent died the owner, and the tax liability in both situations should, therefore, be the same.

Again, if the executor distributed the stock to the beneficiaries, or sold it, during the year after death, the amount of the estate's tax liability would, under petitioner's theory, be affected by the date of distribution or sale. If that date were just prior to the declaration or record date of a dividend payment, the value of the stock distributed or sold would include the value of the dividend and that value would, therefore, be included in the gross estate. If, on the other hand, the stock were distributed or sold a few days later *ex dividend*, petitioner's theory would require the

exclusion of the value of the dividend from the value of the gross estate, even though the actual value of the estate would be the same in both situations. We submit that a construction of the statute resulting in such a baseless distinction does not properly reflect the Congressional purpose.

Moreover, adoption of the petitioner's theory would, in many cases, allow the executor to write a large part of his own tax bill. It is common knowledge that the fortunes of many wealthy individuals are lodged in personal holding companies. The executor of the estate of such an individual could very substantially reduce the value of the stock of the personal holding company by the simple expedient of having the company distribute extraordinary dividends during the year after death. This would not, of course, affect the actual value of the estate at all, and yet, under petitioner's theory, the executor would have succeeded in eliminating from taxation the entire value of the dividend, which might, in some cases, represent a very substantial part of the decedent's wealth. Cf. *S. Silberman & Sons* v. *Commissioner*, 76 F. (2d) 360 (C. C. A. 7th).[9]

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[9] Petitioners in the *Abendroth* and *Blacque* cases (Nos. 510 and 511, present Term) attempt to avoid the force of this position by the suggestion that a distinction should be drawn between ordinary and extraordinary dividends and that, in the case of an extraordinary dividend, the stock should be included in gross estate at its value before the payment of the dividend (Br. 41–42). The suggested distinction, however, finds no support in any express provision of the statute

It is true that the court below did express some doubt as to the propriety of considering the right to dividends as a property right because of the absence of any fixed obligation on the part of the corporation prior to the declaration of the dividend. For the reasons we have stated, we do not believe this fact to be material. But even if it be a factor to be considered, it is not, as the court below concluded, a sufficient reason for distinguishing between dividend rights and the rights to interest and rents. From a practical standpoint, as Judge Learned Hand pointed out (R. 35), "investors do not think of the income from their securities as differing, because they have separately enforceable rights in the case of debts, leases, etc., and none in the case of shares of stock; they think of all as interchangeably income from investments." In view of this, it may fairly be assumed that Congress intended to treat all income rights derived from investments in securities in the same manner. And since, as we have shown,

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and seems difficult to reconcile with the remainder of the argument of these petitioners. Throughout the rest of their brief, the argument is that only capital assets are to be included under Section 302 (j), that income, by definition, is not a return of capital, and that, therefore, a right to receive income is not a capital asset. This argument is just as applicable to extraordinary as to ordinary dividends, for all are equally income to the stockholder. *Lynch* v. *Hornby*, 247 U. S. 339. It would seem, therefore, that these petitioners' recognition of the failure of their argument with respect to extraordinary dividends is a recognition of the fallacy of their entire approach to the case.

the statute plainly covers the rights to interest and rents, it should likewise be construed to comprehend the right to dividends.

6. The Regulation is in Accord with the Congressional Purpose as Shown by the Legislative History of the Statute

The legislative history of Section 302 (j) shows that its enactment was motivated by a desire to relieve against undue hardship resulting from a decline in the market value of the assets in an estate. See H. Rep. No. 1681, 74th Cong., 1st Sess., p. 9; S. Rep. No. 1240, 74th Cong., 1st Sess., p. 9. Both before and during the consideration of the 1935 Act, it was several times pointed out to Congress that, because of the depression, many estates had depreciated greatly in value, some more than 60%, during the period necessary for administration and that in such cases it was unfair to base the estate tax on values which existed only at the date of death and which did not represent the value of the assets available for distribution.[10] Different suggestions were advanced to remedy this situation;[11] the method ultimately adopted in the 1935

[10] See H. Rep. No. 708, 72d Cong., 1st Sess., pp. 50–51; Reports to the Joint Committee on Internal Revenue Taxation, Federal and State Death Taxes (1933), pp. 135, 137, 164–165, 254, 255; Hearings before the House Committee on Ways and Means on Proposed Taxation of Individual and Corporate Incomes, Inheritances and Gifts, 74th Cong., 1st Sess., pp. 134–135, 136–138; Hearings before the Senate Finance Committee on H. R. 8974, 74th Cong., 1st Sess., pp. 204–207, 281, 282.

[11] Apparently the first proposal for the alleviation of the hardship caused by a shrinkage in values was contained in

Act was worked out by the Conference Committee. See H. Rep. 1885, 74th Cong., 1st Sess., pp. 10–11.

Section 810 of H. R. 10236, 72d Cong., 1st Sess. (1932), as reported to the House, which provided that, at the option of the executor, the tax payable should be that proportion of the tax which would have been payable on the values as of the date of death as the value of the net estate 18 months after death bears to the value of the estate at death. See H. Rep. No. 708, 72d Cong., 1st Sess., pp. 50–51. Under this proposal, it would seem plain that income to the estate during the 18-month period would be included in the optional valuation. The proposal, as amended on the floor of the House (75 Cong. Rec., Part 7, p. 7322), was stricken out by the Senate Finance Committee (S. Rep. No. 665, 72d Cong., 1st Sess., p. 54) and was again defeated on the floor of the Senate because of the serious effect it would have on the revenues (75 Cong. Rec., Part 10, p. 11385). The Senate views prevailed. H. Rep. No. 1492, 72d Cong., 1st Sess., p. 27 (Amendment No. 251).

The next proposal was made in a 1933 report to the Joint Committee on Internal Revenue Taxation on Federal and State Death Taxes. This report described in detail the situation caused by a change in property values (pp. 135–136, 137–138) and suggested a plan for the taxation of depreciated estates (pp. 164–165, 254–255). This plan, which was introduced in the record of the hearings before the House Committee considering the 1935 Act (see House Hearings, *supra*, note 10, pp. 136–138), provided for determining the tax rate on the basis of the values existing at the date of death and applying this rate to the value of the estate at the time of its distribution. Under this plan, it seems clear that income received by the estate during the period before distribution would be included in the value of the gross estate (see p. 135 of the report).

The Revenue Bill of 1935, as passed by the House, took care of the situation in a different manner. Designed as an inheritance tax to be imposed in addition to the existing estate tax, it provided for taxation of the beneficial interests

At every stage of the legislative process, however, the emphasis was on the need for allowing the

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transferred to each beneficiary and further provided that the total gross value of such beneficial interests was to be determined as of the date of the decedent's death (Section 204 (a)). By Section 205 (a) (7), however, a deduction was allowed from gross value to the extent of "The net shrinkage in value of the total beneficial interests of the beneficiary arising solely from the difference in value of assets of the decedent's estate on the date of death and the value of such assets one year after the decedent's death (or date of sale or exchange in the case of assets sold or exchanged during such period), but only to the extent that such shrinkage is not covered by any other deduction under this subsection."

At the hearings on the bill before the Senate Committee on Finance, Robert H. Jackson, then Assistant General Counsel of the Treasury, suggested that the House bill presented serious administrative difficulties because it required two valuations to be made. Senate Hearings, *supra*, note 7, pp. 204–206. He suggested that the House provision might be replaced by a deduction from the value on the date of death limited to the amount of the loss sustained during the period of administration through the sale of any assets. (*Id.*) The Senate, however, did not adopt this suggestion. It substituted increased estate tax rates in place of the inheritance tax provided for by the House bill and in Section 202 provided for a deduction from gross estate equal to "The net shrinkage in value of assets arising solely from the difference in the aggregate value of assets forming part of the decedent's gross estate on the date of death and the aggregate value of such assets one year after the decedent's death (or date of sale or exchange by the executor in the case of assets sold or exchanged during such period) but only to the extent that such shrinkage is not covered by any other deduction under this subdivision".

The present provisions of the law were worked out in conference, probably to alleviate the difficulties, suggested by Mr. Jackson, which would be caused under the Senate and House bills because of the necessity for two valuations.

executor to value the estate at what it was actually worth when it became available for distribution rather than at the unrealizable values which existed at the time of the decedent's death.[12]

The relief afforded by Section 302 (j) must be measured by the hardship it was designed to alleviate—the imposition of an estate tax based on values which did not properly reflect the value of the assets actually available for distribution. Alleviation of that hardship obviously called for no more than disregarding those values which, at the time of distribution, were no longer accessible; it neither required nor justified disregarding values which were in fact accessible. As the court below pointed out (R. 35), if executors "are not to be assessed upon what is practically beyond their

[12] See House Hearings, *supra*, note 10, p. 137; Senate Hearings, *supra*, note 10, pp. 204–207, 281-282; H. Rep. No. 708, 72d Cong., 1st Sess., pp. 50–51; S. Rep. No. 1240, 74th Cong., 1st Sess., p. 9, where the Senate Committee stated its understanding that the deduction for shrinkage in value was to be "confined to the shrinkage which could be shown to exist by taking the difference between the aggregate value of *all* assets at the date of death and the aggregate value of *all* assets 1 year after death" (italics supplied); H. Rep. No. 1681, 74th Cong., 1st Sess., p. 9, where the House Ways and Means Committee stated: "To prevent any *undue* hardship arising from a decline in value after the date of death, a *special* deduction is allowed for *net* shrinkage, based upon the difference between the value of assets on the date of death and 1 year thereafter * * *" (italics supplied); 79 Cong. Rec., Part 13, p. 14632; Reports to the Joint Committee on Internal Revenue Taxation, Federal and State Death Taxes (1933), pp. 135, 137, 164–165, 254–255.

reach they should certainly be compelled to accept in its stead the total of what is practically within it."

The point is well illustrated by the example given in the Regulations, which is set out in the margin.[13] Under petitioner's construction of the statute the only amounts to be included in the gross estate under the optional valuation method are real estate, $30,000; bonds sold, $59,400; corporate stock distributed, $100,000; bonds matured, $12,000; and corporate stock not disposed of, $50,000—a total of $251,400, plus $1,380 interest accrued at the date

[13] The Regulations (*infra*, pp. 66–75) give the following example of the operation of Section 302 (j):

Description	Valuation date	Value at valuation date	Value at date of death
Improved real estate—not disposed of within year following decedent's death	Dec. 1, 1936	$30,000	$35,000
Rents accrued but unpaid under lease antedating decedent's death	Dec. 1, 1936	900	500
Rent paid Jan. 1, 1936	Jan. 1, 1936	600	
Bonds sold June 1, 1936	June 1, 1936	59,400	60,000
Interest accrued and unpaid thereon	June 1, 1936	400	400
Interest paid Apr. 1, 1936	Apr. 1, 1936	1,200	
Corporate stock—distributed to legatee Nov. 1, 1936	Nov. 1, 1936	100,000	200,000
Cash dividend paid upon such stock Aug. 1, 1936	Aug. 1, 1936	100,000	
Bonds matured and paid Oct. 1, 1936	Oct. 1, 1936	12,000	12,000
Interest accrued			80
Interest paid at maturity	Oct. 1, 1936	240	
Interest paid Apr. 1, 1936	Apr. 1, 1936	240	
Corporate stock—not disposed of within year following decedent's death, and upon which no dividend was paid in that period	Dec. 1, 1936	50,000	100,000
Total value of gross estate pursuant to the election		354,980	
Total value of gross estate as of date of decedent's death			407,980

of death. Yet, as of one year after death, the estate had available over $100,000 additional in the form of dividend payments and interest and rent receipts and accruals. That amount was available for payment of the estate tax and for distribution to the beneficiaries. Therefore, to include that amount in the measure of the value of the gross estate would not in any way contravene the Congressional purpose of avoiding "confiscation of estates due to a sudden decline in market values." See S. Rep. No. 240, 74th Cong., 1st Sess., p. 9. On the contrary, to the extent of the income received or accrued, the decline in the market value of the securities is offset and to that extent, therefore, no relief is necessary. Indeed, it is not difficult to conceive of a situation in which an estate would actually have more at the end of the one-year period, because of income receipts and accruals, than it had at the date of death, despite a decline in market prices, and yet under petitioner's contention it would be relieved of estate tax to the extent of the market decline. Such a case would present the anomaly of an extension of tax relief to a taxpayer whose ability to pay the estate tax had actually been increased.

Petitioner places great reliance on the fact that in the Conference Committee report on the Revenue Bill of 1935 (H. Rep. N. 1885, 74th Cong., 1st Sess., p. 11) an example of the operation of

Section 302 (j) was given,[14] in which no mention was made of any interest, rents, or dividends received during the year after death. But the example also contains no mention of any interest or rents accrued to the date of death, although such accrued income is admittedly part of the value of the gross estate as of the date of death. Consequently, all that the example indicates is that the draftsmen of the report either completely overlooked the problem created by the receipt or accrual of interest, rents, and dividends, or else that they believed that the inclusion of such income in the example was unnecessary for purposes of the point they were seeking to make.

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[14] The report stated (pp. 10–11):

"A decedent dies owning real estate of the value of $100,000, corporate stock of the value of $60,000, bonds of the value of $20,000, foreign government bonds maturing 9 months after date of death of a face value of $10,000, but of a value of $9,550, and cash amounting to $5,000. These values are as of the date of death. The gross estate at date of death amounted, therefore, to $194,550. The decedent had debts of $15,000 and the administration expenses were $25,000, which debts and expenses were promptly paid by the executor. The value of the net estate as of date of death was, therefore (after taking off the specific exemption), $114,550. Six months after the decedent's death the executor distributed the bonds to a legatee under the will, at which time they were worth $18,000, and he sold all the corporate stock owned by the decedent for a fair market value of $50,000 in order to raise cash to pay the debts and expenses. The foreign bonds were paid in full at maturity. During the first year after the decedent's death the value of his real estate appreciated $5,000. The executor elects to

Petitioner's brief makes no mention of the fact that the enactment of the Revenue Act of 1935 was motivated by the need for greatly increased revenues, and that it provided for a very substantial increase in the estate-tax rates as well as for a reduction in the amount of the specific exemption allowed.[15] Certainly it is highly unreasonable to assume that in the same measure by which Congress sought to raise large additional sums for the federal Treasury, it also intended to grant to certain taxpayers a windfall of millions of dollars by

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take advantage of the new provision of the bill. The value will be arrived at in this way:

Assets:		*Value*
Real estate (as of 1 year after death)		$105,000
Corporate stock (as of date of sale)		50,000
Bonds (as of date of distribution)		18,000
Foreign bonds (as of date of disposition, i. e., maturity)		10,000
Cash		5,000
Gross estate		188,000
Deduct:		
Debts	$15,000	
Administration expenses	25,000	
Specific exemption	40,000	
		80,000
Net estate		108,000"

[15] The Act was passed in response to a message of the President, in which he strongly urged increased taxation upon the "transmission from generation to generation of vast fortunes by will, inheritance, or gift", his specific recommendation being the enactment of an inheritance tax in addition to the then existing estate tax. See H. Rep. No. 1681, 74th Cong., 1st Sess., pp. 1–4; S. Rep. No. 1240, 74th Cong., 1st Sess., pp. 1–4. The House adopted this recommendation, but the Senate, whose views prevailed, substituted increased estate-tax rates in lieu of the additional inheritance tax.

giving them, in a relief provision, a tax reduction unrelated to the need sought to be relieved. Only the most specific statutory language could justify attributing to Congress any such caprice.

7. A Provision of a Tax Statute Granting a Special Privilege Is To Be Strictly Construed

Section 302 (j) provides executors with a valuable privilege enabling them, in many cases, substantially to reduce the amount of the estate tax which would otherwise be payable. A provision granting such a special privilege, like provisions granting exemptions, deductions, or other favored treatment, must be strictly construed. See e. g., *United States* v. *Stewart,* No. 13, present Term, decided November 12, 1940; *Helvering* v. *Northwest Steel Rolling Mills, Inc.,* No. 121, present Term, decided November 12, 1940; *Helvering* v. *Inter-Mountain Life Ins. Co.,* 294 U. S. 686, 689–690; *New Colonial Ice Co.* v. *Helvering,* 292 U. S. 435, 440; *Brown* v. *Helvering,* 291 U. S. 193, 199; *Deputy* v. *DuPont,* 308 U. S. 488, 493; *White* v. *United States,* 305 U. S. 281, 292; *Chicago Theological Seminary* v. *Illinois,* 188 U. S. 662, 672. These decisions, it is true, relate to exemptions or deductions, but their rationale is fully applicable to such a special privilege as that granted by Section 302 (j). See *Commissioner* v. *Manus Muller & Co.,* 79 F. (2d) 19, 20 (C. C. A. 2d). The basis of the rule would appear to be a presumption that the legislative authority does not intend to aban-

don any source of revenue unless that intention be clearly expressed, and that consequently anyone claiming favored treatment must bear the burden of showing that his claim comes strictly within the letter of the statute. See Paul & Mertens, *Law of Federal Income Taxation*, Vol. I, Sec. 3.30. Certainly in the light of the arguments advanced in the foregoing pages, the most that petitioner here may claim is that the interpretation of Section 302 (j) is a matter of doubt. If there be any such doubt, then, under the authorities cited, it must be resolved against the taxpayer.

Petitioner derives no help from the principle upon which he relies (Br. 34) that a relief measure should "be construed liberally in favor of the taxpayers to give the relief it was intended to provide." *Bonwit Teller & Co.* v. *United States*, 283 U. S. 258, 263; *Burnet* v. *Marston*, 57 F. (2d) 611, 612 (App. D. C.). As we have shown, all relief necessary to meet the situation which prompted enactment of Section 302 (j) is accorded by the Regulation; the question here is not whether the taxpayer should secure such relief, but whether in addition thereto, he should secure an unnecessary and unjustified windfall. The authorities cited by petitioner do not support his position on that question.[16]

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[16] *Helvering* v. *Bliss*, 293 U. S. 144, 150–151, cited by petitioners in Nos. 510 and 511, is likewise not in point. There the Court held that a provision for charitable deductions,

8. The Contentions Advanced by the Petitioner in This Case and by the Petitioners in the Abendroth and Blacque Cases Do Not Establish the Invalidity of the Regulation

For purposes of convenience we shall discuss in this portion of the brief not only the contentions advanced by the petitioner in this case but also the contentions advanced by the petitioners in the *Abendroth* and *Blacque* cases (Nos. 510 and 511, present Term), with which this case is to be argued, the petitioners in all three cases being referred to collectively as "the taxpayers." Most of those contentions have been answered in the preceding sections of this brief. Various miscellaneous arguments advanced, however, require further brief analysis.

A. *The Regulation covers only the rights to interest, rents, dividends, and royalties.*—In both of their briefs the taxpayers emphasize what they conceive to be the difficulty of applying the theory of the Regulation to types of income not involved in any of the present cases, such as the progeny of livestock owned by the decedent which are born after decedent's death, crops grown after death upon decedent's land, and rents collected under a lease made by the executor. The simple answer to the taxpayer's difficulty is that the Regulation does not cover this type of case.

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since it was "begotten from motives of public policy," was not to be narrowly construed. There is no comparable policy applicable to Section 302 (j).

The Regulation (pp. 69–70, *infra*) first discusses interest-bearing obligations, such as bonds and notes; it then provides that "Like rules will govern, *so far as applicable,* when any other *obligation* is involved, as, for example, one calling for the payment of rent or a royalty" (italics supplied). Finally it takes up dividends on stock and payments on a judgment. Nowhere, however, does it provide for the inclusion of the progeny of livestock, crops grown on decedent's land after his death, or rental payments under a lease made by the executor. Indeed, the latter type of income, at least, seems plainly to be ruled out since the provision for the inclusion of the right to rent states that "in the case of rent, if the realty and the obligation to pay the rent reserved were parts of the gross estate at the time of decedent's death", then the valuation date of any rent paid during the year after death is to be the date of payment.

The Regulation has been so construed by the Bureau of Internal Revenue. The Chief Counsel of the Bureau has informed us that it is the policy and the practice of the Bureau not to include as part of decedent's gross estate, under the optional valuation method, the value of crops planted after the date of decedent's death, livestock born after that date, or rents under leases made by the decedent's executor, and that if any of these items have been included in any case, such inclusion is due solely to error on the part of the examining officer.

In these circumstances, it is unnecessary to consider whether the statute is susceptible of a different construction with respect to these items than that placed upon it by the Bureau. It may be that the Regulation does not go far enough, but the only question here is its validity within the sphere in which it operates. And certainly there is ample ground for the distinction which the Bureau has drawn between the specific rights of the decedent, as against particular persons or corporations, to interest, rents, dividends, and royalty payments, on the one hand—rights which existed at the time of decedent's death and which entered into the value of his gross estate—and the general "right" of the decedent, as against the whole world, to enjoy whatever income his efforts may produce from the property which he owns. In the latter type of situation, no income can be enjoyed unless specific action is taken with respect to the property owned, i. e., planting crops, breeding livestock, executing leases; the owner of stocks, bonds, or real estate subject to a lease, on the other hand, has a presently existing right to income which may be enjoyed without further action on his part. Consequently, the taxpayers' contention that the general "right" to the enjoyment of any future income, which is inherent in property ownership, is not of itself a property right, has no bearing on the validity of the Regulation in its application to the specific rights to interest, rents, and dividends.

It is true that under the statute, as construed by the Regulation, some income realized by the estate during the year after death will be included in the measure of the value of the gross estate and some will not. This result, however, is directly attributable to the character of the property of which decedent died the owner, which the statute makes determinative. And it is to be noted that a similar lack of symmetry in the treatment of income is inherent in the taxpayers' construction of the statute. It is not disputed that if a security owned by the decedent is sold by his executor during the year after death for more than its value at the date of death, the resulting capital gain, which is taxable income to the estate, must also be included in the value of the gross estate (Sec. 113 (a) (5)). Clearly, therefore, the taxpayers' theory, no less than the theory embodied in the Regulation, requires that some income be included and some excluded. The lack of consistency under the taxpayers' theory, however, goes much further. It means, as we have pointed out, the drawing of an illogical distinction between increases in the value of an estate due to accumulated corporate earnings, which are reflected in an increased value for the stock, and those due to distributed corporate earnings (see pp. 38–39, *supra*); it also means the drawing of an illogical distinction between increases in the value of United States Savings Bonds, for example, and increases in value of comparable interest-bearing bonds. In these circum-

stances, lack of symmetry in the treatment of income under the Regulation is certainly no reason for rejecting the Regulation in favor of the taxpayers' construction of the statute.

B. *No question of double taxation is involved.*—The suggestion of the petitioner in this case (Br. 16) and the contention of the petitioners in the *Abendroth* and *Blacque* cases (Br. 17), based on the presumption against double taxation (see *United States* v. *Supple Biddle Co.*, 265 U. S. 189; *Bull* v. *United States*, 295 U. S. 247), shows a misconception of the theory of the Regulation. The interest, rents and dividends received during the year after death, which are taxable income of the estate, are not subject under the Regulation to an estate tax. The subject of the estate tax is rather the right to the interest, rents and dividends, and the amount of the interest, rents and dividends received is used simply as a measure of the value of the right. That this is not double taxation is clearly pointed out in *Bull* v. *United States, supra,* a decision upon which the taxpayers strongly rely. There the decedent was a member of a personal service partnership having no invested capital. Under the partnership agreement the surviving partners had a right, with the permission of decedent's executor, to continue the partnership for a year after the decedent's death, in which case the estate was to share in the profits and losses in the same manner as decedent would have if living. The partnership

was continued and a share of the profits paid to the estate. The Commissioner included these profits as part of decedent's gross estate as of the date of death. In holding this action to be erroneous, in part because it involved double taxation, this Court stated:

> While * * * the same sum may in different aspects be used for the computation of both an income and an estate tax, this fact will not here serve to justify the Commissioner's rulings. They were inconsistent. *The identical money,—not a right to receive the amount, on the one hand, and actual receipt resulting from that right on the other,—was the basis of two assessments.* [Italics supplied.]

The situation here is analogous to the treatment which is always accorded income accrued to the date of decedent's death. Such accrued income is taxable as income to the decedent; it is also included as part of his gross estate as of the date of death. Since that is not considered objectionable double taxation (see *Bull* v. *United States, supra,* at 255), there is no reason to consider objectionable the comparable inclusion of income rights under Section 302 (j). It should be noted that, even under the taxpayers' construction of Section 302 (j), the statute would in some cases result in the imposition of both an income and an estate tax, since any capital gains made during the year after death would be both income and part of the gross estate.

But even apart from these considerations, it seems entirely clear, as the court below pointed out (R. 35–36), that the presumption against double taxation is not applicable when such double taxation as may be involved results from an election made by the executor. Computation of gross estate under the optional valuation method is a privilege; if the taxpayer wishes not to be subject to both estate and income taxes, he "may always escape by accepting an assessment as of the time of death" (R. 36).

C. *Only net income is used to measure the value of decedent's income rights.*—The taxpayers also question the propriety of the Regulation because, they assert, gross income is used to measure the value of decedent's income rights without any deduction for operating costs. This contention relates primarily to the propriety of the inclusion of rents as a measure of value, since there are normally no operating costs in connection with bonds and stocks. Even as regards rent, the contention would not seem available to the taxpayers, since the record in the case is silent as to whether the estate had any operating costs in connection with decedent's leased realty, and no leased realty at all is involved in the *Abendroth* and *Blacque* cases.

But in any event, the contention is without merit. The property to be valued is the decedent's right to receive income; the value of that right may, of

course, properly be measured only by the net income received. Consequently, although the Regulation is silent on the question, the Bureau of Internal Revenue, so we are informed, has made it its policy to include in the measure of value only the net income received by the executor.[17] Thus, if the decedent at his death owned real property subject to a lease, the value of his right to rent is to be measured by the gross rental less operating expenses, which would include maintenance and repairs, local taxes, management and brokerage fees, and the like. Cf. *Gude* v. *Commissioner,* unreported memorandum opinion of the Board of Tax Appeals, decided June 17, 1940, appeal to the Circuit Court of Appeals for the Fourth Circuit pending, No. 4684.

D. *The authorities relied upon by the taxpayers are distinguishable.*—The taxpayers place their principal reliance on *Bull* v. *United States,* 295 U. S. 247, *United States* v. *Safety Car Heating Co.,* 297 U. S. 88, *Irwin* v. *Gavit,* 268 U. S. 161, *Koshland* v. *Helvering,* 298 U. S. 441, and *Lynch* v. *Hornby,* 247 U. S. 339. All of these decisions are readily distinguishable.

In the *Bull* case, as stated above (*supra,* p. 56), the Commissioner included in decedent's gross estate as of the date of death the profits which had been earned after decedent's death by a personal service partnership without invested capital.

[17] The Bureau informs us that, although there may have been instances to the contrary, such instances do not reflect the general policy and practice of the Bureau.

These profits had been paid to the estate pursuant to a provision of the partnership agreement that the estate was to share in the partnership profits and losses in the same manner as though the decedent were alive. In holding the Commissioner's action to be erroneous, the Court pointed out, first, that the Commissioner had levied the tax on the profits themselves and not on decedent's right to the profits, and second, that the right of a partner to share in the earnings of a personal service partnership which has no capital and owns no tangible property cannot be considered a valuable capital asset. This holding, of course, has no application here. The only right which the members of such a partnership have is the right to whatever profits their collective efforts in the future may earn. This right is of dubious value, since each partner is also liable for his share of the losses; in any event, since enjoyment of the right is dependent upon future services to be rendered by each of the partners it cannot fairly be characterized as a present property right. The rights to interest, rents, and dividends, on the other hand, have a present value and their realization is not dependent upon the rendition of future services; they may, therefore, as we have shown, properly be considered as part of the decedent's gross estate.

The *Safety Car Heating Co.* case, *supra,* is even further afield. The question there was as to the date when profits recovered on a claim of patent

infringement were income realized by the patentee. Some of the acts of infringement took place prior to March 1, 1913, but as of that date the claim was contested and no collection was made until 1925. The patentee urged that any profits received in 1925 because of infringements which had taken place prior to 1913 should be construed as income accrued on March 1, 1913. The Court, however, held otherwise, pointing out that on March 1, 1913, both the existence and extent of petitioner's right was so contingent and indefinite as to lack the quality of accrued income, and that the proceeds of the claim must, therefore, be considered income when realized. The decision is inapplicable here for two reasons. The first is the obvious difference between an indefinite and contested claim for patent infringement and a definite contractual right to interest, rents, and dividends; the second is that the *Safety Car Heating Co.* case related to the question of when income is realized and not to the question of whether a specific right to future income is a presently existing property right. The contention here is not, as it was in the *Safety Car Heating Co.* case, that the interest, rents, and dividends received by the estate constituted income accrued prior to the decedent's death and consequently were not income to the estate. The contention is rather that at his death decedent owned a right to that income and that that right was property within the meaning of Section 302 (j).

Insofar as the *Safety Car Heating Co.* decision has any bearing on that question, it supports our position, because the Court there recognized that the contested claim might properly be regarded as "property," although not as "property that has been transmuted into capital." 297 U. S. at 97.

Nor is there anything opposed to our position in *Irwin* v. *Gavit, supra,* in *Koshland* v. *Helvering, supra,* or in *Lynch* v. *Hornby, supra.* In the *Gavit* case the holding was that income received by a beneficiary of a testamentary trust is taxable as income to him and is not exempt as property acquired by bequest. In the *Koshland* case, the holding was that a dividend of common stock paid to holders of preferred stock constitute income rather than a return of capital. In *Lynch* v. *Hornby, supra,* the holding was that corporate dividends are taxable income to the stockholder, even though extraordinary in amount and to a large extent derived from surplus accumulated prior to March 1, 1913. These cases simply stand for the proposition, which we do not dispute, that the interest, rents, and dividends received by the petitioner in this case were taxable income to the estate. They do not hold or in any way suggest that decedent's rights to that income, owned by him at the date of his death, were not property rights within the meaning of Section 302 (j).

CONCLUSION

The decision below should be affirmed.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

SAMUEL O. CLARK, JR.,
Assistant Attorney General.

SEWALL KEY,
RICHARD H. DEMUTH,
HARRY MARSELLI,
Special Assistants to the Attorney General.

ANDERSON PAGE,
Attorney.

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APPENDIX

Revenue Act of 1926, c. 27, 44 Stat. 9, as amended:

SEC. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated—

(a) To the extent of the interest therein of the decedent at the time of his death;

* * * * *

(c) To the extent of any interest therein of which the decedent has at any time made a transfer, by trust or otherwise, in contemplation of or intended to take effect in possession or enjoyment at or after his death, except in case of a bona fide sale for an adequate and full consideration in money or money's worth. * * *

* * * * *

(j) If the executor so elects upon his return (if filed within the time prescribed by law or prescribed by the Commissioner in pursuance of law), the value of the gross estate shall be determined by valuing all the property included therein on the date of the decedent's death as of the date one year after the decedent's death, except that (1) property included in the gross estate on the date of death and, within one year after the decedent's death, distributed by the executor (or, in the case of property included in the gross estate under subdivision (c), (d), or (f) of this section, distributed by the trustee under the instrument of transfer), or sold, exchanged, or otherwise disposed of,

shall be included at its value as of the time of such distribution, sale, exchange, or other disposition, whichever first occurs, instead of its value as of the date one year after the decedent's death, and (2) any interest or estate which is affected by mere lapse of time shall be included at its value as of the time of death (instead of the later date) with adjustment for any difference in its value as of the later date not due to mere lapse of time. No deduction under this title of any item shall be allowed if allowance for such item is in effect given by the valuation under this subdivision. Wherever in any other subdivision or section of this title or in Title II of the Revenue Act of 1932, reference is made to the value of property at the time of the decedent's death, such reference shall be deemed to refer to the value of such property used in determining the value of the gross estate. In case of an election made by the executor under this subdivision, then for the purposes of the deduction under section 303 (a) (3) or section 303 (b) (3), any bequest, legacy, devise, or transfer enumerated therein shall be valued as of the date of decedent's death with adjustment for any difference in value (not due to mere lapse of time or the occurrence or nonoccurrence of a contingency) of the property as of the date one year after the decedent's death (substituting the date of sale or exchange in the case of property sold or exchanged during such one-year period). [Added by Sec. 202 (a) of the Revenue Act of 1935, C. 829, 49 Stat. 1014.]

* * * * *

SEC. 303. For the purpose of the tax the value of the net estate shall be determined—

(a) In the case of a resident, by deducting from the value of the gross estate—

* * * * *

(2) An amount equal to the value of any property (A) forming a part of the gross estate situated in the United States of any person who died within five years prior to the death of the decedent, or (B) transferred to the decedent by gift within five years prior to his death, where such property can be identified as having been received by the decedent from such donor by gift or from such prior decedent by gift, bequest, devise, or inheritance, or which can be identified as having been acquired in exchange for property so received. This deduction shall be allowed only where a gift tax imposed under the Revenue Act of 1924, or an estate tax imposed under this or any prior Act of Congress was paid by or on behalf of the donor or the estate of such prior decedent as the case may be, and only in the amount of the value placed by the Commissioner on such property in determining the value of the gift or the gross estate of such prior decedent, and only to the extent that the value of such property is included in the decedent's gross estate and not deducted under paragraph (1) or (3) of this subdivision;

* * * * *

Treasury Regulations 80 (1937 Ed.):

ART. 11. *Optional valuation date.*—In general, the object of subdivision (j) of section 302 is to make provision whereby the amount of tax otherwise payable may be lessened when, within the year following the decedent's death, the gross estate has suffered a shrinkage in its aggregate value.

If the decedent died after August 30,

1935, the executor may, by an election upon his return, Form 706, if filed within the time prescribed by law or prescribed by the Commissioner in pursuance of law, have the property which was included in the gross estate on the date of the decedent's death valued as of the applicable dates, as follows:

(1) Any property distributed, sold, exchanged, or otherwise disposed of within one year after the decedent's death, valued as of the date of such distribution, sale, exchange, or other disposition, whichever first occurs;

(2) Any property not distributed, sold, exchanged, or otherwise disposed of within such 1-year period, valued as of the date one year after the date of the decedent's death;

(3) Any property, interest, or estate which is affected by mere lapse of time, valued as of the date of decedent's death; except that an adjustment is to be made for any difference in its value, not due to such lapse of time, as of the date one year after the date of decedent's death, or as of the date of its distribution, sale, exchange, or other disposition, whichever date first occurs.

Property "distributed" is limited to distributions thereof by the executor, or by the trustee in the case of property included in the gross estate under subdivision (c), (d), or (f) of section 302, as amended. Distribution may be effected by the entry of the order or decree of distribution, or, if there is no such order or decree, by the segregation or separation of the property from the estate or the trust, or by the actual paying over or delivery of the property to the person entitled thereto by the will, or under the law, or by the terms of the trust.

The sale, exchange, or other disposition, to which subdivision (j) refers, may be one made by the executor, or by the trustee of property included in the gross estate under subdivision (c), (d), or (f) of section 302, as amended, or by any other person to whom the property had not been distributed by the executor or by such a trustee, or to whom it had not passed from the gross estate as the result of a sale, exchange, or other disposition thereof, as, for example, a sale, exchange, or other disposition by an heir, devisee, donee or grantee to whom the decedent in his lifetime transferred the property, or by the survivor of the decedent if the property had been held by them subject to the right of survivorship.

Property, in the case of a sale, exchange, or other disposition thereof within the 1-year period, is to be valued as of the date when it ceases to form a part of the gross estate, that is, the date when the title passes as the result of its sale, exchange, or other disposition. The terms "distributed," "sold," "exchanged," "or otherwise disposed of" comprehend all possible ways by which property may be separated or passed from the gross estate. Thus, money on hand at decedent's death which is thereafter used in the payment of the funeral expenses, or in settlement of claims against the estate, or is invested, falls within the term "otherwise disposed of."

The property to be valued as of one year after the date of decedent's death, or as of date of decedent's death, or as of some intermediate date, is the property included in the gross estate on the date of the decedent's death. As property and its value are separate and distinct, the former denoting legal

rights, the latter the monetary measure of such rights, and as subdivision (j) treats of the two separately, it will be necessary in every case first to determine what property constituted the gross estate at decedent's death. Subdivisions of section 302, as amended, other than subdivision (j), supply the information necessary to that determination, subdivision (j) being, in the main, confined to the date or dates as at which the value is to be ascertained.

Interest-bearing obligations, such as bonds and notes, embody two promises, one to pay principal and the other to pay interest, and both promises are a part of the gross estate at the death of the decedent, if the obligation was then owned by him, or had been previously so transferred by him, or at his death there was vested in him any such right or power in or with respect to the obligation as to bring it within any of the other subdivisions of section 302, as amended. If the valuation date is that of decedent's death, the principal of the obligation and interest then accrued and unpaid thereon are to be valued as of that date. If the valuation date is subsequent to death, the principal and interest then accrued and unpaid are to be valued as of that date. The valuation date of any part payment of principal or of any installment of interest, made between decedent's death and the date as at which the obligation is to be valued, will be the date of such payment. Like rules will govern, so far as applicable, when any other obligation is involved, as, for example, one calling for the payment of rent or a royalty. Thus, in the case of rent, if the realty and the obligation to pay the rent reserved were parts of the gross estate at the time of

decedent's death, the value of the former must be determined as of the applicable valuation date, and also the value of the rent then accrued and unpaid reserved by the latter. The valuation date of any rent paid in the interim pursuant to the rental obligation will be the date of its payment.

As in the case of bonds and notes, the interest accrued and unpaid upon a judgment on the date as of which the judgment is to be valued is to be included in the valuation. The valuation date of any part payment of the judgment, or of any interest thereon (without regard to whether earned before or after decedent's death), made between decedent's death and the date as of which the judgment is to be valued, will be the date of such payment.

When corporate stock is a part of the gross estate at decedent's death, and a dividend in partial liquidation is thereafter paid on or before the date as of which the stock is to be valued, the valuation date of such dividend will be the date of its payment. Similarly, a dividend paid within the same period out of earnings, whether the earnings are made or accumulated prior or subsequent to decedent's death, will be valued as of the date of its payment. Earnings of the corporation neither declared as a dividend nor paid between decedent's death and the valuation date of the stock, will be reflected in the value of the stock. But a dividend declared prior to the valuation date of the stock and payable subsequent thereto will not be so reflected if the stock is selling "ex dividend" on such valuation date, but is to be valued as of that date.

Differing from payments of principal and interest in the case of bonds and notes, those

made upon a judgment are not pursuant to a promise but to an obligation imposed by law which obligation, in its totality, is a part of the gross estate at decedent's death if coming within any of the other subdivisions of section 302, as amended. So, too, liquidating dividends and dividends paid from earnings are not pursuant to a promise but are referable to legal rights inherent in stock ownership.

By way of illustrating the operation of subdivision (j), there is given the following example in which the death of the decedent will be taken to have occurred December 1, 1935:

Description	Valuation date	Value at valuation date	Value at date of death
Improved real estate—not disposed of within year following decedent's death	Dec. 1, 1936	$30,000	$35,000
Rents accrued but unpaid under lease antedating decedent's death	Dec. 1, 1936	900	500
Rent paid Jan. 1, 1936	Jan. 1, 1936	600	.....
Bonds sold June 1, 1936	June 1, 1936	59,400	60,000
Interest accrued and unpaid thereon	June 1, 1936	400	400
Interest paid Apr. 1, 1936	Apr. 1, 1936	1,200	.....
Corporate stock—distributed to legatee Nov. 1, 1936	Nov. 1, 1936	100,000	200,000
Cash dividend paid upon such stock Aug. 1, 1936	Aug. 1, 1936	100,000	.....
Bonds matured and paid Oct. 1, 1936	Oct. 1, 1936	12,000	12,000
Interest accrued			80
Interest paid at maturity	Oct. 1, 1936	240	.....
Interest paid Apr. 1, 1936	Apr. 1, 1936	240	.....
Corporate stock—not disposed of within year following decedent's death, and upon which no dividend was paid in that period	Dec. 1, 1936	50,000	100,000
Total value of gross estate pursuant to the election	.....	354,980	.....
Total value of gross estate as of date of decedent's death	.....	.....	407,980

Properties, interests, or estates which are affected by mere lapse of time include patents, estates for the life of a person other than the decedent, remainders, reversions,

and other like properties, interests, or estates. The phrase "affected by mere lapse of time" has no reference to obligations for the payment of money, whether or not interest-bearing, the value of which changes with the passing of time. However, such an obligation, like any other property, may become affected by lapse of time when made the subject of a bequest or transfer which itself is creative of an interest or estate so affected.

The date of valuation of any property, interest, or estate so affected is, as prescribed in subdivision (j), the date of decedent's death, but with an adjustment to be made of the value then obtaining, which adjustment, while disregarding any later increase or decrease in value due solely to lapse of time, adds to or subtracts from the value at death any difference between that value and the value as of the date one year after decedent's death, or the applicable intermediate date, if, and to the extent that, such difference was due to a cause or causes other than lapse of time. Accordingly, in the valuation of any property, interest, or estate affected by lapse of time, the difference between its value at decedent's death and its value as of the later date must be analyzed to determine the portion of such difference attributable to other cause or causes, and that portion only is to be applied in adjusting the value as of the date of the decedent's death. If, for example, the decedent owned a patent which on the date of his death had an unexpired term of 10 years and a value of $100,000, and if the patent was sold 6 months after the decedent's death, at which time, because of the lapse of time and other causes, only $65,000 was realized therefor, the value would be determined as follows:

Value of patent on date of decedent's death		$100,000
Difference between value on date of death and date of sale ($100,000 minus $65,000)	$35,000	
Portion of such difference due to the 6 months elapsing between date of death and date of sale (one-half of 10 percent of $100,000)	5,000	
Portion of difference due to causes other than lapse of time		30,000
Adjusted value of patent		70,000

Or, to give another example, it may be supposed that the decedent was entitled to receive property which, at the time of his own death, was worth $50,000 upon the death of another person who was entitled to the income therefrom for life and who was 31 years old at the time of the decedent's death. The value at decedent's death of his remainder interest would, as explained in articles 10 (i) of these regulations, be $15,631, and if, due to economic conditions, the property declined in value and became worth $40,000 one year after the date of decedent's death, the value of the remainder interest would be determinable in the following manner:

Value of remainder interest at decedent's death ($50,000 times factor (0.31262) shown opposite age 31 in column 3 of Table A, article 10)		$15,631.00
Value of remainder interest one year after decedent's death ($40,000 times factor (0.31929) shown in Table A, for age 32)		12,771.60
Net difference due in part to decline in value of the property and in part to increase in the value of the remainder interest due to lapse of time	2,859.40	
Elimination of the increase due to lapse of time ($50,000 times the difference between the factor for age 32 and the factor for age 31, or 0.00667)	333.50	
Portion of the difference in value due to the decline in value of the property		3,192.90
Value of remainder interest at decedent's death		15,631.00
Less portion of difference not due to lapse of time		3,192.90
Adjusted value of remainder interest		12,438.10

(The amount of the adjustment may be computed more readily by multiplying the decline in the value of the property ($10,000) by the factor (0.31929) applicable to the later date.)

Deductions authorized under section 303 are limited to the extent that allowance thereof is not, in effect, given in the valuing of the gross estate. Property passing by decedent's will, or passing by a transfer made by the decedent in his lifetime (if the transfer was such as to require the property transferred to be included in the gross estate) to or for any such public, charitable, or religious uses as are described in section 303 (a) (3) or in section 303 (b) (3), is deductible at its value as of the date of the decedent's death, subject, however, to adjustment for any difference in value one year after such death, or at the date of the sale or exchange in the case of property sold or exchanged during such 1-year period. But no such adjustment may take into account any difference in value due to lapse of time or to the occurrence or nonoccurrence of a contingency.

The election is available to the executor only at the time the return is filed, and only if the return is filed within 15 months from the decedent's death, or within the period of an extension of time for filing granted under the provisions of article 68 or 69 of these regulations. The election applies to all the property included in the gross estate on the date of the decedent's death. It cannot be applied only to a portion of such property. The election, if exercised, cannot be rescinded.

In every case where the election is exercised, the return, Form 706, must set forth (1) an itemized description of all property included in the gross estate on the date of the decedent's death, together with the value of each item as of that date, (2) an itemized disclosure of all distributions, sales, exchanges, and other dispositions of any of the prop-

erty during the 1-year period after the decedent's death, together with the dates thereof, and (3) the value of each item of property determined in accordance with the provisions of subdivision (j). The amount of any income accrued and unpaid at the date of the decedent's death on each item of principal, the amount of any income collected or otherwise realized thereon after the decedent's death and prior to the date as of which the item of principal is to be valued, and the amount of any income accrued and unpaid thereon at such subsequent valuation date, shall be separately shown. All the information indicated by Form 706 must be supplied. Statements as to distributions, sales, exchanges, and other dispositions of the property within the 1-year period must be supported by evidence. If the court makes an order or decree of distribution during that period, a certified copy thereof must be submitted as part of the evidence. The Commissioner may require the submission of such additional evidence as is deemed necessary.

U. S. GOVERNMENT PRINTING OFFICE: 1941

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Sup Ct

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1940

No. 510

ESTATE OF CORDELIA Y. ABENDROTH, CITY BANK FARMERS TRUST COMPANY, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF CORDELIA Y. ABENDROTH, DECEASED, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

No. 511

ESTATE OF KATE READ BLACQUE, CITY BANK FARMERS TRUST COMPANY, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF KATE READ BLACQUE, DECEASED, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR CERTIORARI FILED OCTOBER 16, 1940.

CERTIORARI GRANTED NOVEMBER 18, 1940.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 510

ESTATE OF CORDELIA Y. ABENDROTH, CITY BANK FARMERS TRUST COMPANY, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF CORDELIA Y. ABENDROTH, DECEASED, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

No. 511

ESTATE OF KATE READ BLACQUE, CITY BANK FARMERS TRUST COMPANY, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF KATE READ BLACQUE, DECEASED, PETITIONER,

vs.

COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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United States Board of Tax Appeals.

Docket No. 94755.

ESTATE OF CORDELIA Y. ABENDROTH, CITY BANK FARMERS TRUST COMPANY, as Executor of the Last Will and Testament of Cordelia Y. Abendroth, deceased,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket Entries.

APPEARANCES:

For Petitioner: JAMES D. OUCHTERLONEY, ESQ., GEO. H. CRAVEN, ESQ., EARLE J. STARKEY, ESQ.

For Respondent: B. M. BRODSKY, ESQ., E. O. HANSON, ESQ.

1938

July 16—Petition received and filed. Taxpayer notified. (Fee paid.)

July 16—Copy of petition served on General Counsel.

Aug. 15—Answer filed by General Counsel.

Aug. 15—Request for hearing at New York filed by General Counsel.

Aug. 19—Notice issued placing proceeding on New York, N. Y. Calendar. Answer and request served.

1939

July 10—Hearing set Sept. 25, 1939, New York, N. Y.

July 17—Motion to consolidate with docket 97857 for hearing 9/25/39 in New York filed by taxpayer.

Docket Entries.

4 Aug. 19—Motion granted—consolidated for hearing 9/25/39, New York, N. Y.

Sept. 29—Hearing had before Mr. Opper, Division 14. Stipulation of facts filed. Consolidated with 97857. Briefs due Nov. 13, 1939. Reply briefs due Nov. 28, 1939.

Oct. 9—Transcript of hearing Sept. 29, 1939 filed.

Nov. 13—Brief filed by taxpayer.

Nov. 13—Motion for extension to Nov. 20, 1939 to file brief filed by General Counsel. 11/14/39 granted.

Nov. 20—Brief filed by General Counsel.

5 Nov. 21—Copy of petitioner's brief served on General Counsel.

Dec. 5—Motion for extension of time to Dec. 12, 1939 to file reply brief filed by taxpayer. 12/6/39 granted.

Dec. 12—Reply brief filed by taxpayer.

1940

May 17—Opinion rendered—Clarence V. Opper, Division 14. Decision will be entered for the respondent.

May 18—Decision entered—C. R. Arundell, Division 14.

July 5—Petition for review by U. S. Circuit Court of Appeals, Second Circuit, with assignments of error filed by taxpayer.

6 July. 17—Proof of service filed by taxpayer.

Aug. 13—Certified copy of order from Second Circuit consolidating #94755 and #97857 for the purpose of sending up one record, filed.

Aug. 13—Praecipe filed by taxpayer—proof of service and agreement thereon.

Docket Entries.

UNITED STATES BOARD OF TAX APPEALS.

Docket No. 97857.

ESTATE OF KATE READ BLACQUE, CITY BANK FARMERS TRUST COMPANY, as Executor of the Last Will and Testament of Kate Read Blacque, deceased,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

APPEARANCES:

For Petitioner: THOMAS K. EGAN, JR., ESQ., GEORGE CRAVEN, ESQ.

For Respondent: B. M. BRODSKY, ESQ., E. O. HANSON, ESQ.

1939

Apr. 8—Petition received and filed. Taxpayer notified. (Fee paid.)

Apr. 8—Copy of petition served on General Counsel.

Apr. 8—Request for Circuit hearing in New York City filed by taxpayer. 4/8/39 copy served.

May 4—Answer filed by General Counsel.

May 11—Copy of answer served on taxpayer—New York, N. Y.

Aug. 17—Motion for hearing in New York 9/25/39 and for consolidation with docket 94755 filed by taxpayer. 8/19/39 granted—consolidated for hearing 9/25/39, New York, N. Y.

Docket Entries.

10 Aug. 21—Hearing set beginning Sept. 25, 1939 in New York, N. Y.

Sept. 29—Hearing had before Mr. Opper, Division 14, on merits. Consolidated with docket 94755. Stipulation of facts filed. Briefs due Nov. 13, 1939. Reply briefs due Nov. 28, 1939.

Oct. 9—Transcript of hearing Sept. 29, 1939 filed.

Nov. 13—Brief filed by taxpayer.

Nov. 13—Motion for extension to Nov. 20, 1939 to file brief filed by General Counsel. 11/14/39 granted.

Nov. 29—Brief filed by General Counsel.

11 Nov. 21—Copy of taxpayer's brief served on General Counsel.

Dec. 5—Motion for extension of time to Dec. 12, 1939 to file reply brief filed by taxpayer. 12/6/39 granted.

Dec. 12—Reply brief filed by taxpayer.

1940

May 17—Opinion rendered—Clarence V. Opper, Division 14. Decision will be entered for the respondent.

May 18—Decision entered—C. R. Arundell, Division 7.

July 5—Petition for review by U. S. Circuit Court of Appeals, Second Circuit, with assignments of error filed by taxpayer.

12 July 17—Proof of service filed by taxpayer.

Aug. 13—Certified copy of order from Second Circuit consolidating dockets 94755 and 97857 for purpose of sending up one record, filed.

Aug. 13—Praecipe filed by taxpayer—proof of service and agreement thereon.

Petition.

13

UNITED STATES BOARD OF TAX APPEALS.

Docket No. 94755.

ESTATE OF CORDELIA Y. ABENDROTH, CITY BANK FARMERS TRUST COMPANY, as executor of the last will and testament of Cordelia Y. Abendroth, deceased,

Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

14

The above-named petitioner, City Bank Farmers Trust Company, as executor of the last will and testament of Cordelia Y. Abendroth, deceased, hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency bearing the symbols "MT-ET-Cl-7406-14th New York, Estate of Cordelia Y. Abendroth, Date of death—October 9, 1936", which notice of deficiency bears date June 25, 1938, and as a basis for this proceeding alleges as follows upon information and belief:—

15

1. Cordelia Y. Abendroth died on the 9th day of October, 1936, a resident of Harrison, County of Westchester, State of New York. Said decedent left a last will and testament bearing date the 20th day of March, 1923, and a codicil thereto bearing date the 28th day of January, 1932, which were duly admitted to probate by the Surrogate's Court of said County of Westchester, to which jurisdiction in that behalf belonged, on the 16th day of October, 1936, and letters testamentary thereon bearing date said day were duly issued by said court to City Bank Farmers

16 Trust Company, a corporation duly organized and existing under the laws of the State of New York and having its principal place of business at No. 22 William Street, City, County and State of New York. City Bank Farmers Trust Company has been ever since and still is acting as such executor. The return for the Federal estate tax here involved was filed with the Collector of Internal Revenue for the Third District of New York on November 23, 1937.

2. The notice of deficiency (a copy of which is hereto annexed, marked Exhibit A and made a part hereof) was mailed to the petitioner on June 23, 1938.

17 3. The taxes in controversy are Federal estate taxes determined pursuant to the alleged provisions of Title III of the Revenue Act of 1926 as amended and are for and in the sum of $432.83.

4. The determination of the tax set forth in said notice of deficiency is based upon the following errors:—

(a) The said respondent erred in determining that there should be included in the gross estate the sum of $3,783.91, which represented dividends declared and interest earned between the date of the decedent's death and the subsequent optional valuation date, elected by the executor in
18 the Federal estate tax return, pursuant to Section 302(j) of the Revenue Act of 1926 as added by Section 202 of the Revenue Act of 1935.

5. The facts upon which the petitioner relies as a basis for this proceeding are as follows:—

(a) The executor upon its return on Form 706 duly filed within the time prescribed by law, elected to have the gross estate valued at the optional valuation date provided in Section 302(j) of the Revenue Act of 1926, as

added by Section 202 of the Revenue Act of 1935. Subsequent to the date of the decedent's death and up to the said optional valuation date, the dividends declared and interest earned by the assets of the estate amounted to $3,783.91. Said interest and dividends were included by the Commissioner in the gross estate. The inclusion by the Commissioner in the gross estate of the said sum of $3,783.91, which represents dividends declared and interest earned between the date of death and the subsequent optional valuation date, is contrary to the express provisions of Section 302(j) of the Revenue Act of 1926 as added by Section 202 of the Revenue Act of 1935, since that section provides only that property included in the gross estate on the date of the decedent's death shall be valued at the optional valuation date. The provisions of Article 11 of Estate Tax Regulations 80 (1937 Edition), which purport to require the inclusion of such income earned and dividends declared subsequent to the date of death, are contrary to the express provisions of said Revenue Act as amended.

(b) The income earned and dividends declared subsequent to the date of death constituted income and not principal of the decedent's estate and were returned by the executor and by the beneficiaries (to the extent that the same was distributed to such beneficiaries during the taxable year) for income tax purposes and an income tax was paid thereon by the beneficiaries on that part of the income distributed to them.

(c) The petitioner alleges further that if Title III of the Revenue Act of 1926 and Section 302(j) thereof, as added by Section 202 of the Revenue Act of 1935, may be construed or applied so as to include in the gross estate of said decedent interest earned and dividends declared subsequent to the date of death, said statutes are unconstitutional and in violation of the Fifth Amendment of the

22 Constitution of the United States in that they result in the taking of private property for public use without just compensation and in the taking of property without due process of law and are in violation of the Fourth Clause of Section 9 and the Third Clause of Section 2 of Article I of the Constitution of the United States, in that they result in the levying of a direct tax without apportionment.

WHEREFORE, your petitioner prays that this Board may hear the proceeding and determine:—

(a) That the interest earned and dividends declared
23 between the date of death and the subsequent optional valuation date should not be included in the gross estate; and

(b) That there is no deficiency.

And your petitioner will ever pray, &c.

JAMES D. OUCHTERLONEY,
GEORGE H. CRAVEN,
EARLE J. STARKEY,
Counsel for Petitioner,
Office & Post Office Address,
No. 20 Exchange Place,
24 New York, N. Y.

MITCHELL, TAYLOR, CAPRON & MARSH,
No. 20 Exchange Place,
New York, N. Y.
Of Counsel.

State of New York,
County of New York—ss.:

P. A. MILLER, being duly sworn, deposes and says: That he is a Trust Of[illegible]f City Bank Farmers Trust Company, as executor [illegible]e last will and testament of Cordelia Y. Abendroth, deceased, and the petitioner herein, and as such is authorized to verify the foregoing petition; that he has read the foregoing petition and is familiar with the statements contained therein and that the facts stated are true except as to those facts stated to be upon information and belief and those facts he believes to be true.

P. A. MILLER.

Sworn to before me this
8th day of July, 1938.

ALBERT C. POTTS,
Notary Public,
Queens County, N. Y.
Queens Co. Clk's No. 1574, Reg. No. 1235.
Kings Co. Clk's No. 90, Reg. No. 196.
N. Y. Co. Clk's No. 152, Reg. No. 0-P-93.
Commission expires March 30th, 1940.

EXHIBIT A, ANNEXED TO PETITION.

28

TREASURY DEPARTMENT
WASHINGTON

June 25, 1938

MT-ET-Cl-7406-14th New York
Estate of Cordelia Y. Abendroth
Date of death—October 9, 1936

City Bank Farmers Trust Company, Executor,
22 William Street
New York, New York.
Gentlemen:

29

A deficiency of $432.83 in the Federal estate tax liability of the above-named estate has been determined after a review of the file in the case and a consideration of the protest against a deficiency proposed in a previous letter from this office. The determination of the deficiency and the action of this office on the protest are fully explained in the attached statement.

This notice of deficiency is given in accordance with the provisions of Section 306 (a) of the Revenue Act of 1926 as amended by Section 501 of the Revenue Act of 1934, and a petition for a redetermination of the deficiency may be filed with the United States Board of Tax Ap-

30

peals within 90 days (not including Sunday or a legal holiday in the District of Columbia as the nintieth day) from the date of the mailing of this letter. If you acquiesce in this determination and do not desire to file a petition with the United States Board of Tax Appeals, you are requested to execute and forward the enclosed Form 890, waiving the restrictions on the immediate assessment and collection of the deficiency.

The submission of the waiver will expedite the closing of this case and will also benefit the estate by preventing the accumulation of interest charges, as the interest

period terminates 30 days after the filing of the waiver or on the date of assessment, whichever is earlier. The signing of the waiver does not prejudice your right to file a claim for refund of all or any portion of the tax. If you desire to consent to the assessment and collection of only a part of the deficiency, the enclosed form of waiver should be executed in such partial amount.

If within the 90-day period a petition has not been filed with the United States Board of Tax Appeals or the waiver, Form 890, has not been submitted, the deficiency will be thereafter assessed.

Respectfully,

GUY T. HELVERING,
Commissioner,
By (Sgd.) D. S. Bliss,
Deputy Commissioner.

Enclosures:
Statement
Waiver, Form 890.

MT-ET-Cl-7406-14th New York
Estate of Cordelia Y. Abendroth
Date of death—October 9, 1936

STATEMENT

The protest relates to the following items:

Gross Estate

Stocks and Bonds	Returned	Tentatively Determined	Determined
Accrued income	$0.00	$3,783.91	$3,783.91

Exhibit A, Annexed to Petition.

34 Your contention that this item, representing dividends and interest accrued or paid between the date of death and the subsequent optional valuation date, is not subject to inclusion in the gross estate, under the provisions of section 302 (j) of the Revenue Act of 1926 as added by section 202 of the Revenue Act of 1935, is denied, Article 11, Estate Tax Regulations 80 (1937 Edition).

DEDUCTIONS			
Executor's commission	$2,171.71	0.00	2,026.82

In view of the foregoing, the Federal estate tax lia-
35 bility of this estate is finally determined as follows:

Gross estate	96,699.18
Deductions	45,215.69
Net estate	51,483.49
Total net tax	3,178.02
Returned tax	2,745.19
Deficiency	$ 432.83

The deficiency bears interest at the rate of 6 per cent per annum from 15 months after the decedent's death to
36 the date of assessment, or to the thirtieth day after the filing of a waiver of the restrictions on the assessment, whichever is the earlier.

Answer.

37

UNITED STATES BOARD OF TAX APPEALS.

Docket No. 94755.

ESTATE OF CORDELIA Y. ABENDROTH, CITY BANK FARMERS TRUST COMPANY, as executor of the last will and testament of Cordelia Y. Abendroth, deceased,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent. 38

COMES NOW the Commissioner of Internal Revenue, by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and in answer to the petition filed herein, admits, denies and avers as follows:

1. Admits the allegations contained in paragraph 1 of the petition, except it is denied that the return for the Federal estate tax here involved was filed with the Collector of Internal Revenue for the Third District of New York on November 23, 1937. Avers that said return was filed in the Fourteenth Collection District of New York on 39 November 24, 1937.

2. Admits the allegations contained in paragraph 2 of the petition.

3. Admits that the taxes in controversy are Federal estate taxes determined pursuant to the provisions of Title III of the Revenue Act of 1926 as amended. Denies the remaining allegations contained in paragraph 3 of the petition.

Answer.

40 4(a). Denies that the Commissioner erred as alleged in paragraph 4(a) of the petition.

5(a). Admits that the executor upon its return on Form 706 filed within the time prescribed by law, elected to have the gross estate valued at the optional valuation date provided in section 302(j) of the Revenue Act of 1926, as added by section 202 of the Revenue Act of 1935. Admits that subsequent to the date of the decedent's death and up to the said optional valuation date, dividends and interest accrued or were paid to the estate in the amount of $3,783.91. Admits that said interest and dividends were included by the Commissioner in the gross
41 estate. Denies the remaining allegations contained in sub-paragraph (a) of paragraph 5 of the petition.

(b) and (c). Denies the allegations contained in sub-paragraphs (b) and (c) of paragraph 5 of the petition.

6. Denies generally and specifically each and every allegation contained in the taxpayer's petition not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that the appeal be denied and the taxes as shown in the deficiency notice be in all respects approved.

42 Signed J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

Of Counsel:

E. O. HANSON,
Division Counsel.

B. M. BRODSKY,
Special Attorney,
Bureau of Internal Revenue.

Petition.

UNITED STATES BOARD OF TAX APPEALS.

Docket No. 97857.

ESTATE OF KATE READ BLACQUE, CITY BANK FARMERS TRUST COMPANY, as Executor of the Last Will and Testament of Kate Read Blacque, Deceased,

Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

The above named petitioner, City Bank Farmers Trust Company, as executor of the Last Will and Testament of Kate Read Blacque, deceased, hereby petitions for a redetermination of the deficiency set forth by the Commissioner of Internal Revenue in his notice of deficiency bearing the symbols "MT-ET-9041-2nd New York, Estate of Kate Read Blacque, Date of death—April 3, 1937", which notice of deficiency bears date April 3, 1939, and as a basis for this proceeding alleges as follows upon information and belief:

1. Kate Read Blacque died on or about the 3rd day of April, 1937, being at the time of her death a resident of the City, County and State of New York. Said decedent left a Last Will and Testament bearing date the 30th day of June, 1936, which was duly admitted to probate by the Surrogate's Court of said County of New York, to which jurisdiction in that behalf belonged, on the 27th day of April, 1937, and letters testamentary thereon and letters of trusteeship thereunder bearing date on or about said date were duly issued by said Court

46 to City Bank Farmers Trust Company, a corporation duly organized and existing under the laws of the State of New York and having its principal place of business at No. 22 William Street, City, County and State of New York. City Bank Farmers Trust Company has been ever since and still is acting as such executor and as such trustee. The return for the Federal estate tax here involved was filed with the Collector of Internal Revenue for the Second District of New York on July 1, 1938.

2. The notice of deficiency (a copy of which is hereto
47 annexed, marked Exhibit A and made a part hereof) was mailed to the petitioner on April 3, 1939.

3. The taxes in controversy are Federal estate taxes determined pursuant to the alleged provisions of Title III of the Revenue Act of 1926 as amended and are for and in the sum of $13,996.28.

4. The determination of the tax set forth in said notice of deficiency is based upon the following errors:

(a) The said respondent erred in determining that there should be included in the gross estate the sum of
48 $54,578.60, which represents dividends declared and interest earned between the date of the decedent's death and the subsequent optional valuation date, elected by the executor in the Federal estate tax return, pursuant to Section 302(j) of the Revenue Act of 1926 as added by Section 202 of the Revenue Act of 1935.

5. The facts upon which the petitioner relies as a basis for this proceeding are as follows:

(a) The executor upon its return on Form 706 duly filed within the time prescribed by law, elected to have

the gross estate valued at the optional valuation date provided in Section 302(j) of the Revenue Act of 1926, as added by Section 202 of the Revenue Act of 1935. Subsequent to the date of the decedent's death and up to the said optional valuation date, the dividends declared and interest earned by the assets of the estate amounted to $54,578.60. Said interest and dividends were included by the Commissioner in the gross estate. The inclusion by the Commissioner in the gross estate of the said sum of $54,578.60, which represents dividends declared and interest earned between the date of death and the subsequent optional valuation date, is contrary to the express provisions of Section 302(j) of the Revenue Act of 1926 as added by Section 202 of the Revenue Act of 1935, since that section provides only that property included in the gross estate on the date of the decedent's death shall be valued at the optional valuation date. The provisions of Article 11 of Estate Tax Regulations 80 (1937 Edition), which purport to require the inclusion of such income earned and dividends declared subsequent to the date of death, are contrary to the express provisions of said Revenue Act as amended.

(b) The income earned and dividends declared subsequent to the date of death constituted income and not principal of the decedent's estate and were returned by the executor and by the beneficiaries (to the extent that the same was distributed to such beneficiaries during the taxable year) for income tax purposes and an income tax was paid thereon by the beneficiaries on that part of the income distributed to them.

(c) The petitioner alleges further that if Title III of the Revenue Act of 1926 and Section 302(j) thereof, as added by Section 202 of the Revenue Act of 1935, may be construed or applied so as to include in the gross estate of said decedent interest earned and dividends declared

52 subsequent to the date of death, said statutes are unconstitutional and in violation of the Fifth Amendment of the Constitution of the United States in that they result in the taking of private property for public use without just compensation and in the taking of property without due process of law and are in violation of the Fourth Clause of Section 9 and the Third Clause of Section 2 of Article I of the Constitution of the United States, in that they result in the levying of a direct tax without apportionment.

WHEREFORE, your petitioner prays that this Board may
53 hear the proceeding and determine:

(a) That the interest earned and dividends declared between the date of death and the subsequent optional valuation date should not be included in the gross estate; and

(b) That there is no deficiency.

THOMAS K. EGAN, JR.,
GEORGE CRAVEN,
Counsel for Petitioner,
Office and Post Office Address,
20 Exchange Place,
New York, N. Y.

54

MITCHELL, TAYLOR, CAPRON & MARSH,
No. 20 Exchange Place,
New York, N. Y.
Of Counsel.

Petition.

State of New York,
County of New York—ss.: 55

P. A. MILLER, being duly sworn, deposes and says: That he is a Trust Officer of City Bank Farmers Trust Company, as executor of the Last Will and Testament of Kate Read Blacque, deceased, and the petitioner herein, and as such is authorized to verify the foregoing petition; that he has read the foregoing petition and is familiar with the statements contained therein and that the facts stated are true except as to those facts stated to be upon informaion and belief and those facts he believes to be true. 56

P. A. MILLER.

Sworn to before me this
7th day of April, 1939.

ALBERT C. POTTS,
Notary Public,
Queens County, N. Y.
Queens Co. Clk's No. 1574, Reg. No. 1235.
Kings Co. Clk's No. 90, Reg. No. 196.
N. Y. Co. Clk's No. 152, Reg. No. O-P-93.
Commission expires March 30th, 1940. 57
(Seal)

Form 1236 SN-ET-1

58

EXHIBIT A, ANNEXED TO PETITION.

TREASURY DEPARTMENT
Internal Revenue Service

April 3, 1939

Office of
Internal Revenue Agent in Charge
2d New York Division
MT-ET-9041-2nd New York
Estate of Kate Read Blacque
Date of death—April 3, 1937

59

City Bank Farmers Trust Co., Executor
22 William Street
New York, New York

Gentlemen:

You are advised that the determination of the estate-tax liability of the above-named estate, discloses a deficiency of $13,996.28, as shown in the statement attached.

In accordance with the provisions of existing internal-revenue laws, notice is hereby given of the deficiency mentioned.

60 Within 90 days (not counting Sunday or a legal holiday in the District of Columbia as the 90th day) from the date of the mailing of this letter, you may file a petition with the United States Board of Tax Appeals for a redetermination of the deficiency.

Should you not desire to file a petition, you are requested to execute the enclosed form and forward it to Revenue Agent in Charge, 90 Church Street, New York, for the attention of Estate Tax Division. The signing and filing of this form will expedite the closing of your return by permitting an early assessment of the deficiency

and will prevent the accumulation of interest, since the interest period terminates 30 days after filing the form, or on the date assessment is made, whichever is earlier. 61

Respectfully,

GUY T. HELVERING,
Commissioner,
By (Sgd.) C. R. KEIGBAUM,
Internal Revenue Agent in Charge.

Enclosures:
Statement.
Form of waiver. 62

(GPO 2-17683)

63

Exhibit A, Annexed to Petition.

ESTATE TAX

64 MT-ET 9041-2nd New York
Estate of Kate Read Blacque
Date of death April 3, 1937

STATEMENT

	Returned	Tentatively Determined
Gross Estate	1,514,526.91	1,569,105.51
Deductions (1926 Act)	213,619.14	213,524.77
Net estate (1926 Act)	1,300,907.77	1,355,580.74
Gross Estate	1,514,526.91	1,569,105.51
Deductions (1932 Act)	153,619.14	153,524.77
65		
Net estate (1932 Act)	1,360,907.77	1,415,580.74
1. Gross tax (1926 Act)	72,572.62	76,946.46
2. Credit for gift tax	—	—
3. Gross tax less gift tax credit	72,572.62	76,946.46
4. Credit for estate or inheritance tax	58,058.10	61,557.17
5. Net tax (1926 Act)	14,514.52	15,389.29
6. Total gross taxes (1926 and 1932 Acts)	338,090.49	355,585.84
66 7. Gross tax (1926 Act)	72,572.62	76,946.46
8. Gross additional tax	265,517.87	278,639.38
9. Credit for gift tax	—	—
10. Net additional tax	265,517.87	278,639.38
11. Total net tax	280,032.39	294,028.67
Amount assessed as deficiency pursuant to waiver		
Deficiency		13,996.28

Exhibit A, Annexed to Petition.

STATEMENT 67

The deficiency results from the following adjustments:

Stocks and Bonds	Returned	Tentatively Determined	Determined
Items 1-131	1,392,169.54	1,392,169.54	1,392,169.54
Income received and accrued to optional date	0	54,578.60	54,578.60
Total	1,392,169.54	1,446,748.14	1,446,748.14

68

The inclusion of income received and accrued to the date under option has been determined pursuant to the provisions of Article 11, Regulations 80, 1937 Edition, carrying into effect the provisions of Section 302(j) of the Revenue Act of 1926 (as added by section 202(a) of the Revenue Act of 1935). Regulations 80 were issued in accordance with Section 1101 of the Statute, which provides that the Commissioner, with the approval of the Secretary of the Treasury, shall prescribe and publish all needful rules and regulations for the enforcement of the Statute. The said regulations were published in accordance with such approval.

69

Exhibit A, Annexed to Petition.

70

DEDUCTIONS

	Claimed	Tentatively Determined	Determined
Executor's Commission	35,204.02	33,215.53	33,215.53
Miscellaneous administration expenses	7,166.98	9,061.10	9,061.10

The executor's commissions have been determined in the sum allowed by the Surrogate and paid.

71

Item 33 of miscellaneous administration expenses has been increased from $1,000.00 to $3,027.87, proof having been given of the following payments:—

Inter-Continental Forwarding Co.	66.30
Brown & Roese	29.31
Federal & State transfer stamps	432.26
Francis Curry, Special Guardian	2,500.00
	3,027.87.

Item 34 has been allowed to the extent of $1,250.00, which was the amount paid thereon.

72

Answer.

73

UNITED STATES BOARD OF TAX APPEALS.

Docket No. 97857.

CITY BANK FARMERS TRUST COMPANY, as Executor of the Last Will and Testament of Kate Read Blacque, Deceased,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

74

Now comes the respondent by his attorney, J. P. Wenchel, Chief Counsel, Bureau of Internal Revenue, and for answer to the petition filed in the above-entitled case, admits and denies as follows:

1, 2 and 3. Admits the allegations contained in paragraphs 1, 2 and 3.

4(a). Denies that the determination of tax as contained in the deficiency notice is based upon the errors alleged and set forth in paragraph 4(a).

75

5(a). Admits the allegations contained in the first sentence of subparagraph (a) of paragraph 5 of the petition; admits that the income received and accrued to the optional valuation date amounted to $54,578.60, and that said income was included in the decedent's gross estate by the respondent in his deficiency notice; denies all other allegations contained in subparagraph (a) of paragraph 5 of the petition.

76 5(b) and 5(c). Denies the allegations contained in paragraphs 5(b) and 5(c).

6. Denies generally and specifically each and every allegation contained in taxpayer's petition, not hereinbefore admitted, qualified or denied.

WHEREFORE, it is prayed that taxpayer's appeal be denied.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue.

77 Of Counsel:

E. O. HANSON,
Division Counsel,

CONWAY N. KITCHEN,
Special Attorney,
Bureau of Internal Revenue.

CNK-jh 5-1-39

78

Motion for Consolidation.

UNITED STATES BOARD OF TAX APPEALS. 79

Docket No. 94755.

ESTATE OF CORDELIA Y. ABENDROTH, CITY BANK FARMERS TRUST COMPANY, as Executor of the Last Will and Testament of Cordelia Y. Abendroth, Deceased,
Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Docket No. 97857. 80

ESTATE OF KATE READ BLACQUE, CITY BANK FARMERS TRUST COMPANY, as Executor of the Last Will and Testament of Kate Read Blacque, Deceased,
Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

Now come the petitioners in the above-entitled cases, by their undersigned counsel, and respectfully show that the sole question at issue is the same in both of said cases, 81 namely, whether interest and dividends received by the estate between the date of the decedent's death and the optional valuation date provided by Section 302 (j) of the Revenue Act of 1926, as added by Section 202 (..) of the Revenue Act of 1935, are required by said statute to be included in the decedent's gross estate for the purposes of the Federal estate tax. The petitioners show that the issue in said cases is one of law and not of fact; that counsel for the petitioners are the same in both cases; that said case having Docket No. 94755, involving the

82 estate tax on the estate of Cordelia Y. Abendroth, deceased, has been placed on the Board's circuit calendar for hearing in New York City on September 25, 1939, but that said case having Docket No. 97857, involving the estate tax on the estate of Kate Read Blacque, deceased, has not been set for hearing. The petitioners allege that it should result in much saving of time to the Board and counsel for both parties if said cases should be consolidated and heard at the same time.

Petitioners therefore move that said case having Docket No. 97857, involving the estate tax on the estate of Kate Read Blacque, deceased, be placed on the Board's circuit
83 calendar for hearing in New York City on September 25, 1939, and that the above-entitled cases be consolidated for hearing.

Dated August 16, 1939.

THOMAS K. EGAN, JR.,
GEORGE CRAVEN,
Counsel for Petitioners,
20 Exchange Place,
New York, N. Y.

MITCHELL, TAYLOR, CAPRON & MARSH,
20 Exchange Place,
New York, N. Y.
84 Of Counsel.

GRANTED

Consolidation and for hearing
New York City, Sept. 25, 1939

AUG 19 1939

(s) CHARLES P. SMITH
Member.

U. S. Board of Tax Appeals

Stipulation of Facts.

85

UNITED STATES BOARD OF TAX APPEALS.

Docket No. 94755.

ESTATE OF CORDELIA Y. ABENDROTH, CITY BANK FARMERS TRUST COMPANY, as Executor of the Last Will and Testament of Cordelia Y. Abendroth, Deceased,

Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

86

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, by their respective counsel of record, that the following facts may be considered as true without further proof, subject to the right of either party to object on grounds of materiality and relevancy, and to the right of either party to introduce further evidence not inconsistent herewith:

1. City Bank Farmers Trust Company is a corporation duly organized under the banking laws of the State of New York and is engaged in said state in the business of a trust company with its principal office and place of business at 22 William Street, New York, N. Y.

87

2. Cordelia Y. Abendroth, hereinafter referred to as the "decedent" died on October 9, 1936, a citizen of the United States, residing at Harrison, Westchester County, New York. The decedent left a last will and testament bearing date March 20, 1923, and a codicil thereto bearing date January 28, 1932, which were duly admitted to probate by the Surrogate's Court of Westchester County,

88 New York, on October 16, 1936. On the last mentioned date letters testamentary were duly issued by said court to said City Bank Farmers Trust Company, the executor named in said will, which since said date has been and is now the duly appointed, qualified and acting executor of said last will and testament, and which as such executor is the petitioner herein.

3. The Federal estate tax return of the estate of the decedent was filed by the petitioner on November 24, 1937 with the Collector of Internal Revenue for the Fourteenth District of New York.

89 4. The taxes in controversy are Federal estate taxes of the said estate. On June 25, 1938, the Commissioner of Internal Revenue mailed a notice of deficiency to the petitioner, in which a deficiency in estate taxes of $432.83 was determined.

5. The petitioner elected upon the aforesaid return to have the gross estate valued at the optional valuation dates provided by Section 302(j) of the Revenue Act of 1926, as added by Section 202(a) of the Revenue Act of 1935.

90 6. Exhibit "A", attached hereto and hereby made a part hereof, is a true and correct copy of Schedule B of the aforesaid estate tax return, with certain minor exceptions not relevant hereto, and with the exception of the various footnote references and footnotes appearing therein, and the parties hereby stipulate that the information contained therein is correct. Said Exhibit "A" contains all of the stocks and bonds which should have been included, and were included, in the aforesaid estate tax return.

The values of the bonds shown in said Exhibit "A"

are exclusive of any value representing the right to interest accrued and unpaid thereon at the date of death and the optional valuation dates, respectively, and interest paid thereon prior to those dates, but are inclusive of any value representing the right inhering in the ownership of said bonds to interest accruing thereon after said dates. The values of the stocks shown in said Exhibit "A" are exclusive of any value representing the right to dividends declared and payable to stockholders of record on dates prior to the date of death and the optional valuation dates, respectively, but unpaid on said dates (i. e., "ex dividend"), and dividends paid thereon prior to those dates, but are inclusive of any value representing the right inhering in the ownership of said stock to dividends payable to stockholders of record on dates subsequent to those dates. 91 92

The stipulation in this paragraph is made without prejudice to the right of the respondent to contend that the items of interest shown in said Exhibit "A" as having accrued between the date of death and up to and including the respective optional valuation dates, whether paid or unpaid during that period, and the items of dividends shown in said Exhibit "A" as being payable to stockholders of record after the date of death and to and including the respective optional valuation dates, whether paid or unpaid during that period, should be included in the gross estate for estate tax purposes, and without prejudice to the right of the petitioner to contend that said items should not be so included. 93

7. The petitioner included in said gross estate in said return all income accrued to the date of said decedent's death, consisting of interest accrued but not due amounting to $379.09 on bonds owned by the decedent at the date of her death, and dividends of $206.25 on stocks owned by the decedent at the date of her death which were pay-

94 able to stockholders of record as of a date prior to her death, making a total of $585.34 so included. The said interest and dividends amounting to $585.34 were reported and included in the gross estate for estate tax purposes at their face value, and are not in dispute.

8. During the one-year period after the date of decedent's death, her estate received in cash: (1) interest of $1,417.70 which accrued after the date of her death on bonds owned by her at the date of her death and retained by her estate until the expiration of one year after her death; (2) interest of $60.77 which accrued after the date
95 of her death on bonds owned by the decedent at the date of her death and sold or redeemed within one year after said date and which was paid by the purchaser or on redemption; and (3) dividends of $1,829.40 on stocks owned by her at the date of her death which were payable to stockholders of record as of a date subsequent to the date of her death. In addition thereto, on the date one year after the decedent's death, i. e., October 9, 1937, there was interest accrued but not due of $314.79 which had accrued after the date of decedent's death on bonds owned by her at the date of her death, and there were dividends of $161.25 declared on stocks owned by the decedent at the date of her death which were payable subse-
96 quent to October 9, 1937 to stockholders of record as of a date prior to said date. The said five items of interest and dividends amounting to $3,783.91 were included by the petitioner in said estate tax return for purposes of information, but were not included by the petitioner in the gross estate for estate tax purposes. The said dividends referred to in this paragraph amounting to $1,990.65 were ordinary dividends and were not extraordinary or liquidating dividends, and were declared and paid or payable out of current earnings of the paying

corporations or out of accumulated earnings of the paying corporations for years prior to the date of death. 97

9. The Commissioner in the notice of deficiency determined that the aforesaid items of interest and dividends, amounting to $3,783.91, should be included in the gross estate of the decedent for estate tax purposes, and the question at issue is whether such items are subject to the estate tax.

10. The gross estate of the decedent, excluding said items aggregating $3,783.91, has a value for estate tax purposes of $92,915.27, determined as of the optional valuation date provided by Section 302(j) of the Revenue Act of 1926, as added by Section 202(a) of the Revenue Act of 1935. The deductions other than the specific exemption amount to $5,215.69, and the net estate for estate tax purposes, excluding said items of $3,783.91, amounts to $47,699.58. If the said items of $3,783.91 are properly includible in said gross estate, the values of said gross estate and said net estate should be increased in the said amount of $3,783.91. 98

Dated: September 28, 1939.

ROLLIN BROWNE,
GEORGE CRAVEN,
Counsel for Petitioner. 99

J. P. WENCHEL,
Chief Counsel for Bureau of
Internal Revenue,
Counsel for Respondent.

EXHIBIT A, ANNEXED TO STIPULATION OF FACTS.

100 STOCKS AND BONDS

Item	Subsequent Valuation Date	Value Under Option	Value as of Date of Death
1. 45 shares, American Telephone & Telegraph Company, capital $100. par, at 179-1/8* on date of death,, at 157-3/8* on October 9, 1937. Not disposed of within year following death	10/ 9/37	$7,081.88*	$8,060.63*
Dividend paid 10/15/36	10/15/36	101.25**	101.25**
Dividend paid 1/15/37	1/15/37	101.25***	
Dividend paid 4/14/37	4/15/37	101.25***	
Dividend paid 7/15/37	7/15/37	101.25***	
101 Dividend payable 10/15/37	10/15/37	101.25****	
2. 40 shares, American Tobacco Company, common Class "B" $50. par, at 201-1/2 on date of death. (Received 80 shares par $25. in exchange) 80 shares at 74-1/2 on October 9, 1937. Not disposed of within year following death	10/ 9/37	5,960.00	8,060.00
Dividend paid 12/1/36	12/ 1/36	100.00***	
Dividend paid 3/1/37	3/ 1/37	100.00***	
Dividend on 6/1/37	6/ 1/37	100.00***	
Dividend on 9/1/37	9/ 1/37	100.00***	
3. 192 shares, 1st National Bank & Trust Company, Portchester, N.			
102 Y., capital $20. par, at 14 on date of death. At 13 on October 9, 1937. Not disposed of within year following death	10/ 9/37	2,496.00	2,688.00
4. 100 shares, North American Company, common $10. par 33-3/8 on date of death at 19-1/4 on October 9, 1937. Not disposed of within year following death	10/ 9/37	1,925.00	3,337.50
Dividend paid 12/16/36	12/16/36	50.00***	
Dividend paid 4/ 1/37	4/ 1/37	30.00***	
Dividend paid 7/ 1/37	7/ 1/37	30.00***	
Dividend paid 10/ 1/37	10/ 1/37	30.00***	

Exhibit A, Annexed to Stipulation of Facts.

em	Subsequent Valuation Date	Value Under Option	Value as of Date of Death	103
15 shares, Radio Corporation of America, Common no par, at 10-7/8 on date of death. At 8-7/8 on October 9, 1937. Not disposed of within year following death	10/ 9/37	133.13	163.13	
50 shares, Union Pacific Railroad Company, common $100. par, at 139 on date of death. At 98-1/8 on October 9, 1937. Not disposed of within year following death	10/ 9/37	4,906.25	6,950.00	104
Dividend paid 1/1/37	1/ 1/37	75.00***		
Dividend paid 4/1/37	4/ 1/37	75.00***		
Dividend paid 7/1/37	7/ 1/37	75.00***		
Dividend paid 10/1/37	10/ 1/37	75.00***		
30 shares, Westinghouse Electric & Manufacturing Company 7% Cumulative Preferred $50. par, at 156-1/4 on date of death. At 126 on October 9, 1937. Not disposed of within year following death	10/ 9/37	3,780.00	4,687.50	
Dividend paid 12/ 4/36	12/ 4/36	26.25***		
Dividend paid 12/24/36	12/24/36	60.00***		
Dividend paid 2/26/37	2/26/37	30.00***		
Dividend paid 5/31/37	5/31/37	30.00***		105
Dividend paid 8/31/37	8/31/37	30.00***		
$1,000. Chicago Rock Island & Pacific Railway Company, 1st and Refunding, due April 1, 1934, interest 4%, at 19-3/4 flat on date of death. At 16-1/2 less brokerage and tax on December 18, 1936 date of sale by Executor	12/18/36	162.09	197.50	

Exhibit A, Annexed to Stipulation of Facts.

106

Item	Subsequent Valuation Date	Value Under Option	Value as of Date of Death
9. $2,000. Chicago Rock Island & Pacific Railway Company, 1st & Refunding, due April 1, 1934, interest 4%, at 19-3/4 flat on date of death. At 10-1/4 flat on October 9, 1937. Not disposed of within year following death	10/ 9/37	205.00	395.00
10. $1,000. Central Pacific Railway Company, 25 year Guaranteed, due August 1, 1960, interest 5% payable February and August 1,			
107 at 101-7/8 on date of death. At 102-7/8 less brokerage and tax on December 15, 1936 date of sale by Executor	12/15/36	1,025.82	1,018.75
Interest accrued from August 1, 1936 thru date of death			9.58x
Interest accrued from August 1, 1936 to December 15, 1936	12/15/36	9.03xx	
11. $2,000. Central Pacific Railway Company 25 year Guaranteed, due August 1, 1960, interest 5% payable February and August 1, at 101-7/8 on date of death. At 80 on October 9, 1937. Not dis-			
108 posed of within year following death	10/ 9/37	1,600.00	2,037.50
Interest accrued thru date of death			19.17x
Interest paid 2/1/37	2/ 1/37	30.83xxx	
Interest paid 8/1/37	8/ 1/37	50.00xxx	
Interest accrued from August 1 thru October 9, 1937	10/ 9/37	19.17xxxx	
12. $4,000. Cincinnati Gas & Electric Company, 1st Mortgage, due August 1, 1966, interest 3-1/4% payable February and August 1, at 102-3/4 on date of death. At 100-3/4 on October 9, 1937. Not			

Exhibit A, Annexed to Stipulation of Facts.

Item	Subsequent Valuation Date	Value Under Option	Value as of Date of Death	
disposed of within year following death	10/ 9/37	4,030.00	4,110.00	109
Interest accrued thru date of death			24.92x	
Interest paid 2/1/37	2/ 1/37	40.08xxx		
Interest paid 8/1/37	8/ 1/37	65.00xxx		
Interest accrued from August 1 thru October 9, 1937	10/ 9/37	24.92xxxx		
13. $1,000. Commonwealth Edison Company, 1st Mortgage F, due March 1, 1981, interest 4% payable March and September 1, at 107-3/8 on date of death. At 107-1/2 less brokerage and tax on December 16, 1936 date of sale by Executor	12/16/36	1,072.07	1,073.75	110
Interest accrued thru date of death			4.33x	
Interest accrued from September 1 to December 16, 1936	12/16/36	7.23xx		
14. $2,000. Commonwealth Edison Company, 1st Mortgage F, due March 1, 1981, interest 4% payable March and September 1, at 107-3/8 on date of death. At 106-3/8 on October 9, 1937. Not disposed of within year following death	10/ 9/37	2,127.50	2,147.50	111
Interest accrued thru date of death			8.67x	
Interest paid March 1, 1937	3/ 1/37	31.33xxx		
Interest paid September 1, 1937	9/ 1/37	40.00xxx		
Interest accrued from September 1 thru October 9, 1937	10/ 9/37	8.67xxxx		
15. $1,000. Consolidated Gas, Electric Light & Power of Baltimore 1st Refunding, due June 1, 1981, interest 4% payable June and December 1, at 105-3/4 on date of death. At 104 on March 6, 1937 date redeemed by Executor	3/ 6/37	1,046.08	1,057.50	

Exhibit A, Annexed to Stipulation of Facts.

Item	Subsequent Valuation Date	Value Under Option	Value as of Date of Death
Interest accrued thru date of death			14.33x
Interest paid 12/1/36	12/ 1/36	5.67xxx	
Interest accrued from December 1, 1936 to February 10, 1937 date called	2/10/37	6.50xx	
16. $2,000. Duquesne Light Company 1st Mortgage, due June 1, 1965, interest 3-1/2% payable January and December 1, at 108-1/4 on date of death. At 105-3/4 on October 9, 1937. Not disposed of			
113 within year following death	10/ 9/37	2,115.00	2,165.00
Interest accrued thru date of death			25.08x
Interest paid December 1, 1936	12/ 1/36	9.92xxx	
Interest paid June 1, 1937	6/ 1/37	35.00xxx	
Interest accrued from June 1 thru October 9, 1937	10/ 9/37	25.08xxxx	
17. $2,000. Idaho Irrigation Company, Ltd. Adjustment Mortgage, 6s, due January 1, 1928, worthless		—0—	—0—
18. $2,000. Illinois Central Railroad Company, 40 year, due August 1, 1966, interest 4-3/4% payable February and August 1, at 84-3/4 on date of death. At			
114 50-1/2 on October 9, 1937. Not disposed of within year following death	10/ 9/37	1,010.00	1,695.00
Interest accrued thru date of death			18.21x
Interest paid 2/1/37	2/ 1/37	29.29xxx	
Interest paid 8/1/37	8/ 1/37	47.50xxx	
Interest accrued from August 1 thru October 9, 1937	10/ 9/37	18.21xxxx	
19. $1,000. Illinois Steel Company, Debenture Guaranteed, due April 1, 1940, interest 4-1/2% payable April and October 1, at 107-3/4 on date of death. At 106-5/8			

Exhibit A, Annexed to Stipulation of Facts.

Item	Subsequent Valuation Date	Value Under Option	Value as of Date of Death	
less brokerage and tax, on December 15, 1936 date of sale by Executor	12/15/36	1,063.32	1,077.50	115
Interest accrued thru date of death			1.12x	
Interest accrued from October 1 to December 15, 1936	12/15/36	8.13xx		
20. $2,000. Illinois Steel Company, Debenture Guaranteed, due April 1, 1940, interest 4-1/2% payable April and October 1, at 107-3/4 on date of death at 107-1/8 on October 9, 1937. Not disposed of within year following death	10/ 9/37	2,142.50	2,155.00	116
Interest accrued thru date of death			2.26x	
Interest paid 4/1/37	4/ 1/37	42.74xxx		
Interest paid 10/1/37	10/ 1/37	45.00xxx		
Interest accrued from 10/1 thru 10/9/37	10/ 9/37	2.26xxxx		
21. $2,000. Kansas City Railways Company, 2nd and Sinking Fund Series A 6s, due July 7, 1944, worthless		—0—	—0—	
22. $4,000. Louisville & Nashville Railroad Company, 1st and Refunding Series D, due 2003, interest 4% payable April and October 1, at 102-1/2 on date of death. At 93-1/4 on October 9, 1937. Not disposed of within year following death	10/ 9/37	3,730.00	4,100.00	117
Interest accrued thru date of death			4.00x	
Interest paid 4/1/37	4/ 1/37	76.00xxx		
Interest paid 10/1/37	10/ 1/37	80.00xxx		
Interest accrued from 10/1 thru 10/9/37	10/ 9/37	4.00xxxx		

Exhibit A, Annexed to Stipulation of Facts.

Item	Subsequent Valuation Date	Value Under Option	Value as of Date of Death
118			
23. $2,000. New Orleans Terminal Company, 1st Mortgage Series A, due July 1, 1953, interest 4% payable January and July 1, at 98-1/4 on date of death. At 87 on October 9, 1937. Not disposed of within year following death	10/ 9/37	1,740.00	1,965.00
Interest accrued thru date of death			22.00x
Interest paid 1/1/37	1/ 1/37	18.00xxx	
Interest paid 7/1/37	7/ 1/37	40.00xxx	
119 Interest accrued from 7/1 thru 10/9/37	10/ 9/37	22.00xxxx	
24. $1,000. New York Central & Hudson River Railroad Company, Lake Shore Collateral, due February 1, 1998, interest 3-1/2% payable February and August 1, at 96-7/8 on date of death. At 98-1/4 less brokerage and tax on November 17, 1936 date of sale by executor	11/ 7/36	979.58	968.75
Interest accrued thru date of death			6.71x
Interest accrued from 8/1/36 to 11/17/36	11/17/36	3.60xx	
120 25. $2,000. New York Central & Hudson River Railroad Company, Lake Shore Collateral, due February 1, 1998, interest 3-1/2% payable February and August 1, at 96-7/8 on date of death. At 86-5/8 on October 9, 1937. Not disposed of within year following death	10/ 9/37	1,732.50	1,937.50
Interest accrued thru date of death			13.42x
Interest paid 2/1/37	2/ 1/37	21.58xxx	
Interest paid 8/1/37	8/ 1/37	35.00xxx	
Interest accrued from 8/1 thru 10/9/37	10/ 9/37	13.42xxxx	

Exhibit A, Annexed to Stipulation of Facts.

Item	Subsequent Valuation Date	Value Under Option	Value as of Date of Death	
$1,000. New York, New Haven & Hartford Railroad Company, Debenture, due April 1, 1954, interest 3-1/2% payable April and October 1, at 32-5/8 flat on date of death. At 32-1/2 flat less brokerage and tax on December 16, 1936 date of sale by Executor	12/16/36	322.09	326.25	121
$2,000. New York, New Haven & Hartford Railroad Company, Debenture, due April 1, 1954, interest 3-1/2% payable April and October 1, at 32-5/8 on date of death. At 21-7/8 flat on October 9, 1937. Not disposed of within year following death	10/ 9/37	437.50	652.50	122
Interest paid 1/15/37	1/15/37	17.50xxx		
$1,000. Niagara Falls Power Company, 1st and Refunding, due March 1, 1966, interest 3-1/2% payable March and September 1, at 106-7/8 on date of death. At 109 less tax on December 15, 1936 date of sale by Executor	12/15/36	1,089.60	1,068.75	
Interest accrued thru date of death			3.79x	
Interest accrued from 9/1 to 12/15/36	12/15/36	6.32xx		123
$4,000. Niagara Falls Power Company, 1st and Refunding, due March 1, 1966, interest 3-1/2% payable March and September 1, at 106-7/8 on date of death. At 103-3/4 on October 9, 1937. Not disposed of within year following death	10/ 9/37	4,150.00	4,275.00	
Interest accrued thru date of death			15.17x	
Interest paid 3/1/37	3/ 1/37	54.83xxx		
Interest paid 9/1/37	9/ 1/37	70.00xxx		
Interest accrued from 9/1 thru 10/9/37	10/ 9/37	15.17xxxx		

Exhibit A, Annexed to Stipulation of Facts.

Item	Subsequent Valuation Date	Value Under Option	Value as of Date of Death
124			
30. $1,000. Oregon Washington Railroad and Navigation Company, 1st and Refunding Series A, Guaranteed, due January 1, 1961, interest 4% payable January and July 1, at 107-3/8 on date of death. At 107 less brokerage and tax on December 15, 1936 date of sale by Executor	12/15/36	1,067.07	1,073.75
Interest accrued thru date of death			11.00
Interest accrued from July 1 to December 14, 1936	12/15/36	7.22xx	
125			
31. $2,000. Oregon Washington Railroad and Navigation Company, 1st and Refunding Series A, Guaranteed, due January 1, 1961, interest 4% payable January and July 1, at 107-3/8 on date of death. At 106-1/2 on October 9, 1937. Not disposed of within year following death	10/ 9/37	2,130.00	2,147.50
Interest accrued thru date of death			22.00
Interest paid 1/1/37	1/ 1/37	18.00xxx	
Interest paid 7/1/37	7/ 1/37	40.00xxx	
Interest accrued from 7/1 thru 10/9/37	10/ 9/37	22.00xxxx	
126			
32. $2,000. Pacific Light & Power Company, 1st Mortgage, due July 1, 1942 interest 5% payable January and July 1, at 117-1/8 on date of death. At 112-1/4 on October 9, 1937. Not disposed of within year following death	10/ 9/37	2,245.00	2,342.50
Interest accrued thru date of death			27.50
Interest paid 1/1/37	1/ 1/37	22.50xxx	
Interest paid 7/1/37	7/ 1/37	50.00xxx	
Interest accrued from 7/1 thru 10/9/37	10/ 9/37	27.50xxxx	

Exhibit A, Annexed to Stipulation of Facts.

Item	Subsequent Valuation Date	Value Under Option	Value as of Date of Death	127
3. $1,000. Pennsylvania Ohio & Detroit Railroad Company, 1st and Refunding Series A, due April 1, 1977, interest 4-1/2% payable April and October 1, at 104-3/4 on date of death. At 104 less brokerage and tax on December 15, 1936 date of sale by Executor	12/15/36	1,037.07	1,047.50	
Interest accrued thru date of death			1.13x	
Interest accrued from 10/1 to 12/15/36	12/15/36	8.12xx		
4. $2,000. Pennsylvania Ohio & Detroit Railroad Company, 1st and Refunding Series A, due April 1, 1977, interest 4-1/2% payable April and October 1, at 104-3/4 on date of death. At 104-1/2 on October 9, 1937. Not disposed of within year following death	10/ 9/37	2,090.00	2,095.00	128
Interest accrued thru date of death			2.25x	
Interest paid 4/1/37	4/ 1/37	42.75xxx		
Interest paid 10/1/37	10/ 1/37	45.00xxx		
Interest accrued from October 1, thru October 9, 1937	10/ 9/37	2.25xxxx		
5. $1,000. St. Louis Iron Mountain & Southern Railway Company, River and Gulf Divisions, 1st, stamped, due May 1, 1933, interest 4% payable May and November 1, at 86-5/8 flat on date of death. At 70-1/8 flat on October 9, 1937. Not disposed of within year following death.	12/15/36	832.08	866.25	129
Interest paid 11/1/36	11/ 1/36	20.00xxx		
6. $2,000. St. Louis Iron Mountain & Southern Railway Company, River and Gulf Divisions, 1st, stamped, due May 1, 1933, in-				

Exhibit A, Annexed to Stipulation of Facts.

Item		Subsequent Valuation Date	Value Under Option	Value as of Date of Death
	terest 4% payable May and November 1, at 86-5/8 flat on date of death. At 70-1/8 flat on October 9, 1937. Not disposed of within year following death	10/ 9/37	1,402.50	1,732.50
	Interest paid November 1, 1936	11/ 1/36	40.00xxx	
	Interest paid May 1, 1937.	5/ 1/37	40.00xxx	
37.	$2,000. Southern Railway Company, 1st Consolidated Mortgage, due July 1, 1994, interest 5% payable January and July 1, at 111 on date of death. At 96 on October 9, 1937. Not disposed of within year following death	10/ 9/37	1,920.00	2,220.00
	Interest accrued thru date of death			27.50x
	Interest paid 1/1/37	1/ 1/37	22.50xxx	
	Interest paid 7/1/37	7/ 1/37	50.00xxx	
	Interest accrued from 7/1 thru 10/9/37	10/ 9/37	27.50xxxx	
38.	$1,000. Texas Corporation, Debenture, due June 15, 1951, interest 3-1/2% payable June and December 15, at 103-7/8 on date of death. At 105-1/2 flat less tax on December 16, 1936 date of sale by Executor	12/16/36	1,054.60	1,038.75
	Interest accrued thru date of death			11.18x
	Interest paid 12/15/36	12/15/36	6.32xxx	
39.	$4,000. Texas Corporation Debenture, due June 15, 1951, interest 3-1/2% payable June and December 15, at 103-7/8 on date of death. At 103-7/8 on October 9, 1937. Not disposed of within year following death	10/ 9/37	4,155.00	4,155.00
	Interest accrued thru date of death			44.72x
	Interest paid 12/15/36	12/15/36	25.28xxx	
	Interest paid 6/15/37	6/15/37	70.00xxx	
	Interest accrued from 6/15 thru 10/9/37	10/ 9/37	44.72xxxx	

Exhibit A, Annexed to Stipulation of Facts.

	Subsequent Valuation Date	Value Under Option	Value as of Date of Death	133
$2,400. United States of America Treasury, due April 15, 1946, interest 3-1/4% payable April and October 15, at 108-9/32 on date of death. At 106-10/32 on October 9, 1937. Not disposed of within year following death	10/ 9/37	2,551.50	2,598.75	
Interest accrued thru date of death			37.92x	
Interest paid October 15, 1936	10/14/36	1.18xxx		
Interest paid April 15, 1937	4/15/37	38.90xxx		
Interest accrued from 4/15 thru 10/9/37	10/ 9/37	37.92xxxx		134
40 shares, American Gas & Electric Company, $6. cumulative preferred, no par, at 111* on date of death. At 106-3/4* on October 9, 1937. Not disposed of within year following death	10/ 9/37	4,270.00*	4,440.00*	
Dividend paid 11/2/36	11/ 2/36	60.00**	60.00**	
Dividend paid 2/2/37	2/ 2/37	60.00***		
Dividend paid 5/2/37	5/ 2/37	60.00***		
Dividend paid 8/2/37	8/ 2/37	60.00***		
Dividend payable 11/2/37	11/ 2/37	60.00****		
30 shares, Columbia Gas & Electric Corporation, 6% cumulative preferred Class A, at 108-1/2* on date of death. At 78-7/8 on October 9, 1937. Not disposed of within year following death	10/ 9/37	2,366.25	3,210.00*	135
Dividend paid 11/15/36	11/15/36	45.00**	45.00**	
Dividend paid 2/15/37	2/15/37	45.00***		
Dividend paid 5/15/37	5/15/37	45.00***		
Dividend paid 8/15/37	8/15/37	45.00***		
1 share, Commonwealth & Southern Corporation, $6. cumulative preferred no par, at 78-1/8 on date of death. At 69-1/8 less brokerage and tax on November 17, 1936 date of sale by Executor	11/17/36	68.03	78.13	

Exhibit A, Annexed to Stipulation of Facts.

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Item	Subsequent Valuation Date	Value Under Option	Value as of Date of Death
44. 24 shares, Commonwealth & Southern Corporation, $6. cumulative preferred no par, at 78-1/8 on date of death. At 41-3/4 on October 9, 1937. Not disposed of within year following death	10/ 9/37	1,002.00	1,875.00
Dividend paid 1/1/37	1/ 1/37	18.00***	
Dividend paid 4/1/37	4/ 1/37	18.00***	
Dividend paid 7/1/37	7/ 1/37	18.00***	
Dividend paid 10/1/37	10/ 1/37	18.00***	
45. 130 shares, First National Bank & Trust Company, Portchester, New York, common $10. par, at 14 on date of death. At 13 on 10/9/37. Not disposed of within year following death	10/ 9/37	1,690.00	1,820.00
46. 250 shares, Hortense Mining Company, capital $10. par, worthless	10/ 9/37	—0—	—0—
47. 40 shares, New York Chicago & St. Louis Railroad Company Cumulative preferred, Class A, $100. par, at 90-3/8 on date of death. At 52-5/8 on October 9, 1937. Not disposed of within year following death	10/ 9/37	2,105.00	3,615.00
138 48. 48 shares, Standard Oil Company of Indiana, capital $25. par, at 39-1/8 on date of death. At 37-5/8 on October 9, 1937. Not disposed of within year following death	10/ 9/37	1,806.00	1,878.00
Dividend paid 12/15/36	12/15/36	60.00***	
Dividend paid 3/15/37	3/15/37	19.20***	
Dividend paid 6/15/37	6/15/37	19.20***	
Dividend paid 9/15/37	9/15/37	24.00***	
49. 500 shares, Wyoming Irrigation Company, Inc., Capital $1. par, Worthless	10/ 9/37	—0—	—0—

Exhibit A, Annexed to Stipulation of Facts.

Item	Subsequent Valuation Date	Value Under Option	Value as of Date of Death
50. $1,000. New York Central & Hudson River Railroad Co., Refunding and Improvement, due October 1, 2013, interest 4-1/2% payable April and October 1, at 95-3/8 on date of death. At 94-7/8 less brokerage and tax on 11/17/36 date of sale by Executor	11/17/36	945.83	953.75
Interest accrued thru date of death			1.13x
Interest accrued from 10/1 to 11/17/36	11/17/36	4.62xx	
Less: Cash overdraft	$2,035.29		
Dividends declared and interest earned between date of death and subsequent valuation date under option	3,783.91	5,819.20	

The following note appears at the end of Schedule B of the Estate Tax Return. The respondent does not agree to the correctness of the statements therein contained:

> The items represented by the latter figure to wit $3,783.91 are returned in this schedule for information purposes only and in the form required by Regulations 80, 1937 Edition. They are not included in the gross estate for the reason that the Revenue Act of 1926, as amended, and specifically 302 J thereof added by Section 202 of the Revenue Act of 1935 does not require the inclusion of said items and the provisions of Regulation 80, 1937 Edition, which purport to require their inclusion are contrary to the express provisions of the said Revenue Act, as amended.

* These quotations are "ex dividend".
** Dividend declared before date of death and payable to stockholders of record before date of death.
*** Dividend payable and paid after date of death and before optional valuation date to stockholders of record after date of death.
**** Dividend payable after optional valuation date to stockholders of record after date of death and before optional valuation date.
x Interest accrued but not due at date of death.
xx Interest accrued after date of death to optional valuation date. Not due at latter date but collected from purchaser on sale or from obligor on redemption.
xxx Interest accrued and paid after date of death and before optional valuation date.
xxxx Interest accrued after date of death to optional valuation date but not due at latter date.
The term "dividend reflected" means that a dividend had been declared prior to the date shown but was payable to stockholders of record on a subsequent date.

Stipulation of Facts.

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UNITED STATES BOARD OF TAX APPEALS.

Docket No. 97857.

ESTATE OF KATE READ BLACQUE, CITY BANK FARMERS TRUST COMPANY, as Executor of the Last Will and Testament of Kate Read Blacque, Deceased,

Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,

143 Respondent.

IT IS HEREBY STIPULATED AND AGREED by and between the parties hereto, by their respective counsel of record, that the following facts may be considered as true without further proof, subject to the right of either party to object on grounds of materiality and relevancy, and to the right of either party to introduce further evidence not inconsistent herewith:

1. City Bank Farmers Trust Company is a corporation duly organized under the banking laws of the State
144 of New York and is engaged in said state in the business of a trust company with its principal office and place of business at 22 William Street, New York, N. Y.

2. Kate Read Blacque, hereinafter referred to as the "decedent" died on April 3, 1937, a citizen of the United States, residing in the City, County and State of New York. The decedent left a last will and testament bearing date June 30, 1936, which was duly admitted to probate by the Surrogate's Court of New York County, New York, on April 27, 1937. On the last mentioned date

letters testamentary were duly issued by said court to 145
City Bank Farmers Trust Company, the executor named in said will, which since said date has been and is now the duly appointed, qualified and acting executor of said last will and testament, and which as such executor is the petitioner herein.

3. The Federal estate tax return of the estate of the decedent was filed by the petitioner on July 1, 1938, with the Collector of Internal Revenue for the Second District of New York.

4. The taxes in controversy are Federal estate taxes 146
of the said estate. On April 3, 1939, the Commissioner of Internal Revenue mailed a notice of deficiency to the petitioner, in which a deficiency in estate taxes of $13,996.28 was determined.

5. The petitioner elected upon the aforesaid return to have the gross estate valued at the optional valuation dates provided by Section 302(j) of the Revenue Act of 1926, as added by Section 202(a) of the Revenue Act of 1935.

6. Exhibit "A", attached hereto and hereby made a part hereof, is a true and correct copy of Schedule B 147
of the aforesaid estate tax return, with certain minor exceptions not relevant hereto, and with the exception of the various footnote references and footnotes appearing therein, and the parties hereby stipulate that the information contained therein is correct. Said Exhibit "A" contains all of the stocks and bonds which should have been included, and were included, in the aforesaid estate tax return.

The values of the bonds shown in said Exhibit "A" are exclusive of any value representing the right to interest

148 accrued and unpaid thereon at the date of death and the optional valuation dates, respectively, and interest paid thereon prior to those dates, but are inclusive of any value representing the right inhering in the ownership of said bonds to interest accruing thereon after said dates. The values of the stocks shown in said Exhibit "A" are exclusive of any value representing the right to dividends declared and payable to stockholders of record on dates prior to the date of death and the optional valuation dates, respectively, but unpaid on said dates (i. e., "ex dividend"), and dividends paid thereon prior to those dates, but are inclusive of any value representing
149 the right inhering in the ownership of said stock to dividends payable to stockholders of record on dates subsequent to those dates.

The stipulation in this paragraph is made without prejudice to the right of the respondent to contend that the items of interest shown in said Exhibit "A" as having accrued between the date of death and up to and including the respective optional valuation dates, whether paid or unpaid during that period, and the items of dividends shown in said Exhibit "A" as being payable to stockholders of record after the date of death and to and including the respective optional valuation dates, whether paid or unpaid during that period, should be included in
150 the gross estate for estate tax purposes, and without prejudice to the right of the petitioner to contend that said items should not be so included.

7. The petitioner included in said gross estate in said return all income accrued to the date of said decedent's death, consisting of interest accrued but not due amounting to $1,174.31 on bonds owned by the decedent at the date of her death, and dividends of $2,870.50 on stocks owned by the decedent at the date of her death which were payable to stockholders of record as of a date prior

to her death, making a total of $4,044.81 so included. 151
The said interest and dividends amounting to $4,044.81 were reported and included in the gross estate for estate tax purposes at their face value, and are not in dispute.

8. During the one-year period after the date of decedent's death, her estate received in cash: (1) interest of $4,863.55 which accrued after the date of her death on bonds owned by her at the date of her death and retained by her estate until the expiration of one year after her death; (2) interest of $1,212.24 which accrued after the date of her death on bonds owned by the decedent at the date of her death and sold or redeemed within one 152
year after said date and which was paid by the purchaser or on redemption; and (3) dividends of $43,947.83 on stocks owned by her at the date of her death which were payable to stockholders of record as of a date subsequent to the date of her death. In addition thereto, on the date one year after the decedent's death, i. e., April 3, 1938, there was interest accrued but not due of $578.08 which had accrued after the date of decedent's death on bonds owned by her at the date of her death, and there were dividends of $3,262.75 declared on stocks owned by the decedent at the date of her death which were payable subsequent to April 3, 1938 to stockholders of record as of a date prior to said date. The said five items of in- 153
terest and dividends amounting to $53,864.45 (together with a stock dividend of $714.15 which the petitioner concedes for the reasons stated in footnote A to Exhibit A hereof is subject to tax as part of the decedent's gross estate and which is not in dispute here) were included by the petitioner in said estate tax return for purposes of information, but were not included by the petitioner in the gross estate for estate tax purposes. The said dividends referred to in this paragraph (other than said stock dividend) amounting to $47,210.58 were ordinary

154 dividends and were not extraordinary or liquidating dividends, and were declared and paid or payable out of current earnings of the paying corporations or out of accumulated earnings of the paying corporations for years prior to the date of death.

9. The Commissioner in the notice of deficiency determined that the aforesaid items of interest and dividends, amounting to $53,864.45 (and also said stock dividend of $714.15) should be included in the gross estate of the decedent for estate tax purposes, and the question at issue is whether such items are subject to the estate tax.

155 10. The gross estate of the decedent, excluding said items aggregating $53,864.45, has a value for estate tax purposes of $1,515,241.06, determined as of the optional valuation dates provided by Section 302(j) of the Revenue Act of 1926, as added by Section 202(a) of the Revenue Act of 1935. The deductions other than the specific exemption amount to $113,524.77; the net estate for the purpose of the estate tax imposed by the Revenue Act of 1926, excluding said items of $53,864.45, amounts to $1,301,716.29, and the net estate for the purpose of the estate tax imposed by the Revenue Act of 1932 as amended, excluding said items of $53,864.45, amounts to $1,361,716.29. If the said items of $53,864.45 are properly includible in
156 said gross estate, the values of said gross estate and said net estate should be increased in the said amount of $53,864.45.

Dated: September 28, 1939.

ROLLIN BROWNE,
GEORGE CRAVEN,
Counsel for Petitioner.

J. P. WENCHEL,
Chief Counsel for Bureau of
Internal Revenue,
Counsel for Respondent.

EXHIBIT A, ANNEXED TO STIPULATION OF FACTS.

STOCKS AND BONDS

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	Subsequent Valuation Date	Value Under Option	Value on Date of Death
1. $2,000. Adams Express Company Collateral Trust Distribution, due June 1, 1947, interest 4% payable June and December 1, at 100 on date of death. At 100⅛ less brokerage and tax on June 8, 1937 date of sale by Executor	6/ 8/37	$1,996.65	$2,000.00
Interest accrued thru date of death			27.33x
Interest paid June 1, 1937	6/ 1/37	12.67xxx	
Interest accrued to June 8, 1937	6/ 8/37	1.56xx	
2. $1,000. Adams Express Company, Collateral Trust 50 year, due March 1, 1948, interest 4% payable March and September 1, at 101 on date of death. At 101 less brokerage on June 8, 1937 date of sale by Executors	6/ 8/37	1,007.07	1,010.00
Interest accrued thru date of death			3.67x
Interest accrued to June 8, 1937	6/ 8/37	7.11xx	
3. $5,000. American Telephone & Telegraph Company, 20 year Sinking Fund, Debenture, due November 1, 1943, interest 5½% payable May and November 1, at 112¾ on date of death. At 112½ on April 3, 1938. Not disposed of within year following death	4/ 3/38	5,625.00	5,637.50
Interest accrued thru date of death			116.88x
Interest paid May 1, 1937	5/ 1/37	20.62xxx	
Interest paid November 1, 1937	11/ 1/37	137.50xxx	
Interest accrued to April 3, 1938	4/ 3/38	116.88xxxx	

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Exhibit A, Annexed to Stipulation of Facts.

		Subsequent Valuation Date	Value Under Option	Value on Date of Death
160	4. $10,000. Atchison, Topeka & Santa Fe Railway Company, General, due October 1, 1995, interest 4% payable April and October 1, at 106¼ on date of death. At 98⅝ on April 3, 1938. Not disposed of within year following death (Registered)	4/ 3/38	9,862.50	10,625.00
	Interest accrued thru date of death			3.33x
	Interest paid October 1, 1937	10/ 1/37	196.67xxx	
161	Interest paid April 1, 1938	4/ 1/38	200.00xxx	
	Interest accrued thru April 3, 1938	4/ 3/38	3.33xxxx	
	5. $10,000. Canadian National Railway Company, 25 year Guaranteed due June 15, 1955, interest 4¾% payable June and December 15, at 113⅛ on date of death. At 115½ less brokerage and tax on September 14, 1937 date of sale by Executor	9/14/37.	11,524.88	11,312.50
	Interest accrued thru date of death			143.82x
	Interest paid June 15, 1937	6/15/37	93.68xxx	
162	Interest accrued to September 14, 1937	9/14/37	117.44xx	
	6. $600. Cleveland, Cincinnati, Chicago & St. Louis Railway Company, Refunding and Improvement Series C, due January 1, 1941, interest 6% payable January and July 1, at 103¼ on date of death. At 103 on July 1, 1937 date redeemed by Executor	7/ 1/37	618.00	619.50
	Interest accrued thru date of death			9.30x
	Interest paid July 1, 1937	7/ 1/37	8.70xx	

Exhibit A, Annexed to Stipulation of Facts.

	Subsequent Valuation Date	Value Under Option	Value on Date of Death	163
7. $20,000. Consolidated Federal Farm Loan, The Twelve Federal Land Banks, due May 1, 1955-45, interest 3¼% payable May and November 1, at 100¾ on date of death. At 101⅞ on April 3, 1938. Not disposed of within year following death	4/ 3/38	20,375.00	20,150.00	
Interest accrued thru date of death			276.25x	
Interest paid May 1, 1937	5/ 1/37	48.75xxx		
Interest paid November 1, 1937	11/ 1/37	325.00xxx		
Interest accrued thru April 3, 1938	4/ 3/38	276.25xxxx		164
8. $1,000. City of Detroit, Michigan, Public Sewer Refunding Series A, due January 1, 1957, interest 4¼% payable January and July 1, at 98½ on date of death. At 98¾ on August 18, 1937 date of sale by Executor	8/18/37	987.50	985.00	
Interest accrued thru date of death			10.98x	
Interest paid July 1, 1937	7/ 1/37	10.27xxx		
Interest accrued to August 18, 1937	8/18/37	5.55xx		
9. $10,000. City of Detroit, Michigan, Public Sewer Refunding Series A, due September 16, 1957, interest 4% payable March and September 15, at 98 on date of death. At 98½ on August 18, 1937 date of sale by Executor	8/18/37	9,850.00	9,800.00	165
Interest accrued thru date of death			21.11x	
Interest accrued to August 18, 1937		148.89xx		

Exhibit A, Annexed to Stipulation of Facts.

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	Subsequent Valuation Date	Value Under Option	Value on Date of Death
10. $200. Registered City of Detroit, Michigan, Refunding Series B, due August 1, 1962, interest 3¼% payable February and August 1, at 85½ on date of death. At 86 on August 18, 1937 date of sale by Executor	8/18/37	172.00	171.00
Interest accrued thru date of death			1.14x
Interest paid August 1, 1937	8/ 1/37	2.11xxx	
Interest accrued to August 18, 1937	8/18/37	.31xx	

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11. $355.03 Registered City of Detroit, Michigan Refunding Series C, due August 1, 1962, interest 3¼% payable August 1, at 85½ on date of death. At 86 on August 8, 1937 date of sale by Executor	8/18/37	305.33	303.55
Interest accrued thru date of death			7.79x
Interest paid August 1, 1937	8/ 1/37	3.75xxx	
Interest accrued to August 18, 1937	8/18/37	.54xx	

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12. $1,000. State of Illinois, Highway, due March 1, 1955, interest 4% payable March and September 1, at 112⅝ on date of death. At 122¾ on April 3, 1938. Not disposed of within year following death	4/ 3/38	1,227.50	1,126.25
Interest accrued thru date of death			3.67x
Interest paid September 1, 1937	9/ 1/37	16.33xxx	
Interest paid March 1, 1938	3/ 1/38	20.00x	
Interest accrued thru April 3, 1938	4/ 3/38	3.67xxxx	

Exhibit A, Annexed to Stipulation of Facts.

	Subsequent Valuation Date	Value Under Option	Value on Date of Death	
13. $5,000. State of Illinois, Highway, due March 1, 1957, interest 4% payable March and September 1, at 113¾ on date of death. At 124⅛ on April 3, 1938. Not disposed of within year following death	4/ 3/38	6,206.25	5,687.50	169
Interest accrued thru date of death			18.33x	
Interest paid September 1, 1937	9/ 1/37	81.67xxx		
Interest paid March 1, 1938	3/ 1/38	100.00xxx		
Interest accrued thru April 3, 1938	4/ 3/38	18.33xxxx		170
14. $5,000. City of Lansing, Michigan, Electric Light & Power, due January 2, 1947, interest 4½% payable January and July 2, at 113⅝ on date of death. At 114½ less brokerage on November 9, 1937 date of sale by Executor	11/ 9/37	5,712.50	5,681.25	
Interest accrued thru date of death			57.50x	
Interest paid July 2, 1937	7/ 2/37	55.00xxx		
Interest accrued to November 9, 1937	11/ 9/37	79.38xx		
15. $25,000. Liggett & Myers Tobacco Company, due October 1, 1944, interest 7% payable April and October 1, at 129⅞ on date of death. At 129 on April 3, 1938. Not disposed of within year following death	4/ 3/38	32,250.00	32,468.75	171
Interest accrued thru date of death			14.59x	
Interest paid October 1, 1937	10/ 1/37	860.41xxx		
Interest paid April 1, 1938	4/ 1/38	875.00xxx		
Interest accrued thru April 3, 1938	4/ 3/38	14.59xxxx		

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		Subsequent Valuation Date	Value Under Option	Value on Date of Death
172				
	16. $2,000. New Amsterdam Gas Company, 1st Consolidated Mortgage, due January 1, 1948, interest 5% payable January and July 1, at 113 on date of death. At 118¼ less brokerage and tax on July 13, 1937 date of sale by Executor	7/13/37	2,359.15	2,260.00
	Interest accrued thru date of death			25.83x
	Interest paid July 1, 1937	7/ 1/37	24.17xxx	
	Interest accrued to July 13, 1937	7/13/37	3.33xx	
173				
	17. $25,000. New York Central & Hudson River Railroad Company, Refunding and Improvement Series A, due 2013, interest 4½% payable April and October 1, at 90⅛ on date of death			22,531.25
	$15,000. at 89⅝, $10,000. at 89½ less brokerage and tax on July 14, 1937 date of sale by Executor	7/14/37	22,320.80	
	Interest accrued thru date of death			9.38x
	Interest accrued to July 14, 1937	7/14/37	312.50xx	
174				
	18. $1,000. New York, New Haven & Hartford Railroad Company, Convertible Debenture, due January 1, 1956, interest 3½% payable January and July 1, at 39½ flat on date of death. At 13¾ flat on April 3, 1938. Not disposed of within year following death	4/ 3/38	137.50	395.00
	19. $35,000. City of New York Corporate Stock, due March 1, 1964, interest 4¼% payable			

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	Subsequent Valuation Date	Value Under Option	Value on Date of Death	175
March and September 1, at 110¾ on date of death. At 112⅜ on April 3, 1938. Not disposed of within year following death	4/ 3/38	39,331.25	38,762.50	
Interest accrued thru date of death			136.36x	
Interest paid September 1, 1937	9/ 1/37	607.39xxx		
Interest paid March 1, 1938	3/ 1/38	743.75xxx		
Interest accrued thru April 3, 1938	4/ 3/38	136.36xxxx		
20. $2,000. City of Newark, N. J., School, due May 1, 1957-47, interest 4% payable May and November 1, at 101½ on date of death. At 98 on October 18, 1937 date of sale by Executor	10/18/37	1,960.00	2,030.00	176
Interest accrued thru date of death			34.00x	
Interest paid May 1, 1937	5/ 1/37	6.00xxx		
Interest accrued to October 18, 1937	10/18/37	37.11xx		
21. $1,000. City of Paterson, N. J., General Improvement, due October 1, 1941, interest 4½% payable April and October 1, at 102¾ on date of death. At 102 on September 15, 1937 date of sale by Executor	9/15/37	1,020.00	1,027.50	177
Interest accrued thru date of death			.38x	
Interest accrued to September 15, 1937	9/15/37	20.12xx		
22. $10,000. City of Paterson, N. J., School, due October 1, 1951, interest 4½% payable April and October 1, at 104½ on date of				

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	Subsequent Valuation Date	Value Under Option	Value on Date of Death
death. At 102 on September 15, 1937 date of sale by Executor	9/15/37	10,350.00	10,450.00
Interest accrued thru date of death			3.75x
Interest accrued to September 15, 1937	9/15/37	201.25xx	
23. $3,000. Peoria & Western Railway Company, 1st Consolidated, due April 1, 1940, interest 4% payable April and			
179 October 1, at 94¼ on date of death. At 92½ less brokerage and tax on July 14, 1937 date of sale by Executor	7/14/37	2,766.24	2,827.50
Interest accrued thru date of death			1.00x
Interest accrued to July 14, 1937	7/14/37	33.33xx	
24. $5,000. City of Philadelphia, Pa. due October 16, 1976/46, interest 4¼% payable January and July 1, at 107½ on date of death. At 103½ less brokerage on November 9, 1937, date of sale by Executor	11/ 9/37	5,162.50	5,375.00
180 Interest accrued thru date of death			54.90x
Interest paid July 1, 1937	7/ 1/37	51.35xxx	
Interest accrued to November 9, 1937	11/ 9/37	75.56xx	
25. $5,000. Port of New York Authority Terminal Series D, due March 1, 1960, interest 4¼% payable March and September 1, at 106 on date of death. At 108⅛ less brokerage on July 13, 1937 date of sale by executor	7/13/37	5,393.75	5,300.00

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	Subsequent Valuation Date	Value Under Option	Value on Date of Death	
Interest accrued thru date of death			19.48x	181
Interest accrued to July 13, 1937	7/13/37	58.44xx		
26. $3,000. Wabash Railroad Company, 1st Mortgage, 50 year, due May 1st, 1939, interest 5% payable May and November 1, at 99½ on date of death			2,985.00	
$1,000. at 45 flat less brokerage and tax on March 29, 1938 date of sale by Executor	3/29/38	447.09		
$2,000. at 43¾ flat on April 3, 1938. Not disposed of within year following death	4/ 3/38	875.00		182
Interest accrued thru date of death			63.75x	
Interest paid to May 1, 1937 ($20. per each $25. coupon)	5/ 1/37			
Interest paid to November 1, 1937 ($20. per each $25. coupon)	11/ 1/37	56.25xxx		
27. $10,000. West Virginia, Road Construction, due January 1, 1939, interest 4¼% payable January and July 1, at 103½ on date of death. At 102¼ on April 3, 1938. Not disposed of within year following death	4/ 3/38	10,225.00	10,350.00	183
Interest accrued thru date of death			109.79x	
Interest paid July 1, 1937	7/ 1/37	102.71xxx		
Interest paid January 1, 1938	1/ 1/38	212.50xxx		
Interest accrued thru April 3, 1938	4/ 3/38	109.79xxxx		
28. 47 shares, Albany and Susquehanna Railroad Company, capital $100. par, at 182½ on date of death. At 174 less brokerage and tax on May 24, 1937 date of sale by Executor	5/24/37	8,162.02	8,577.50	

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	Subsequent Valuation Date	Value Under Option	Value on Date of Death
29. 2 shares, Allied Mills, Inc., common no par, at 26 on date of death. At 26⅞ less brokerage and tax on May 25, 1937 date of sale by Executor	5/25/37	52.56	52.00
30. 375 shares, American Can Company, 7% Cumulative preferred $100. par, at 155 on date of death.			58,125.00
75 shares at 155⅞ less brokerage and tax on June 9, 1937			
185 date of sale by Executor	6/ 9/37	11,664.89	
300 shares, at 160 less brokerage and tax on November 9, 1937 date of sale by Executor	11/ 9/37	47,897.04	
Dividend paid July 1, 1937	7/ 1/37	525.00***	
Dividend paid October 1, 1937	10/ 1/37	525.00***	
31. 50 shares, American Can Co., common $25. par, at 108 (dividend reflected) on date of death. At 96⅞ less brokerage and tax on June 8, 1937 date of sale by Executor	6/ 8/37	4,831.00	5,400.00
Dividend paid May 15, 1937	5/15/37	50.00***	
32. 50 shares, American Car & Foundry Company; 7% preferred			
186 $100. par, at 97 (dividend reflected) on date of death. At 87¾ less brokerage and tax on June 10, 1937 date of sale by Executor	6/10/37	4,372.91	4,850.00
Dividend paid April 20, 1937	4/20/37	200.00***	
33. 300 shares, American Gas & Electric Company $6. Cumulative Preferred, no par, at 108¾ (dividend reflected) on date of death. At 108⅜ (dividend reflected) on April 3, 1938. Not			

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	Subsequent Valuation Date	Value Under Option	Value on Date of Death
disposed of within year following death	4/ 3/38	32,512.50	32,625.00
Dividend paid May 1, 1937	5/ 1/37	450.00***	
Dividend paid August 1, 1937	8/ 1/37	450.00***	
Dividend paid November 1, 1937	11/ 1/37	450.00***	
Dividend paid February 1, 1938	2/ 1/38	450.00***	
34. 100 shares, American Locomotive Company 7% Cumulative Preferred $100. par, at 114 on date of death. At 107½ less brokerage and tax on July 13, 1937 date of sale by Executor	7/13/37	10,715.78	11,400.00
35. 600 shares, American Smelting & Refining Company, 7% Cumulative preferred $100. par, at 145¼ (dividend reflected) on date of death			87,150.00
100 shares, at 143 less brokerage and tax on August 19, 1937 date of sale by Executor	8/19/37	14,265.71	
100 shares, at 135* and 100 shares at 134½* less brokerage and tax on October 14, 1937 date of sale by Executor	10/14/37	26,881.46*	
300 shares, at 108¼ (dividend reflected) on April 3, 1938. Not disposed of within year following death	4/ 3/38	32,475.00	
Dividend paid April 30, 1937	4/30/37	1,050.00***	
Dividend paid July 31, 1937	7/ 1/37	1,050.00***	
Dividend paid October 30, 1937	10/30/37	350.00****	
Dividend paid December 21, 1937 on 300 shares	12/21/37	525.00***	
36. 25 shares, American Snuff Company, 6% Preferred $100. par, at 138 on date of death. At 132 less brokerage and tax on July 19, 1937 date of sale by Executor	7/19/37	3,291.42	3,450.00
Dividend paid July 1, 1937	7/ 1/37	37.50***	

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		Subsequent Valuation Date	Value Under Option	Value on Date of Death
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	37. 18 shares, American Sugar Refining Company, 7% Cumulative preferred $100. par, at 133¾ on date of death. At 127* less brokerage and tax on June 18, 1937 date of sale by Executor	6/18/37	2,279.83*	2,407.50
	Dividend paid July 18, 1937	7/18/37	31.50****	
	38. 666 shares, American Telephone & Telegraph Company, capital, $100. par, at 171¼* on date of death			114,052.50*
191	66 shares at 167⅞ less brokerage and tax on May 11, 1937 date of sale by Executor	5/11/37	11,057.08	
	200 shares, at 170 less brokerage and tax on August 17, 1937 date of sale by Executor	8/17/37	33,931.32	
	400 shares, at 115¼* on April 3, 1938. Not disposed of within year following death	4/ 3/38	46,100.00*	
	Dividend paid April 15, 1937 on 666	4/15/37	1,498.50**	1,498.50**
	Dividend paid July 15, 1937 on 600	7/15/37	1,350.00***	
	Dividend paid October 15, 1937 on 400	10/15/37	900.00***	
192	Dividend paid January 15, 1938 on 400	1/15/38	900.00***	
	Dividend paid April 15, 1938 on 400	4/15/38	900.00****	
	39. 200 shares, American Tobacco Company, 6% Cumulative Preferred $100. par, at 135 on date of death			
	100 shares, at 138 and 100 shares at 136¾ less brokerage and tax on July 14-19, 1937 dates of sale by Executor	7-14-19/37	27,406.44	27,000.00
	Dividend paid July 1, 1937	7/ 1/37	300.00***	

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	Subsequent Valuation Date	Value Under Option	Value on Date of Death	193
40. 100 shares, American Tobacco Company, common Class "B" $25. par, at 84⅛ on date of death. At 64⅛ on April 3, 1938. Not disposed of within year following death	4/ 3/38	6,412.50	8,412.50	
Dividend paid June 1, 1937	6/ 1/37	125.00***		
Dividend paid September 1, 1937	9/ 1/37	125.00***		
Dividend paid December 1, 1937	12/ 1/37	125.00***		
Dividend paid March 1, 1938	3/ 1/38	125.00***		
41. 100 shares, Atchison, Topeka & Santa Fe Railway Company, 5% preferred $100. par, at 101½ on date of death. At 93 less brokerage and tax on September 14, 1937 date of sale by Executor	9/14/37	9,270.81	10,150.00	194
Dividend paid August 2, 1937	8/ 2/37	250.00***		
42. 35 shares, Atlanta & Charlotte Airline Company, capital $100. par, at 171½ on date of death. At 162 less brokerage and tax on June 2, 1937 date of sale by Executor	6/ 2/37	5,658.10	6,002.50	
43. 50 shares, Atlantic Refining Company, common $25. par, at 34⅜ on date of death. At 29½ less brokerage and tax on June 8, 1937 date of sale by Executor	6/ 8/37	1,464.82	1,718.75	195
Dividend paid June 15, 1937	6/15/37	12.50****		
44. 114 shares, Baltimore & Ohio Railroad Company 4% preferred $100. par, at 42 on date of death. 100 at 29 and 14 at 28⅞ less brokerage and tax on June 29, 1937 date of sale by Executor	6/29/37	3,276.82	4,788.00	

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	Subsequent Valuation Date	Value Under Option	Value on Date of Death
45. 62 shares, Bigelow Sanford Carpet Company, 6% Cumulative preferred $100. par at 109 on date of death. At 107½ less brokerage and tax on June 2, 1937 date of sale by Executor	6/ 2/37	6,645.02	6,758.00
Dividend paid June 1, 1937	6/ 1/37	93.00***	
46. 69 shares, Bigelow Sanford Carpet Company, common no par, at 54½ on date of death. At 53⅞ less brokerage and tax on			
197 June 2, 1937 date of sale by Executor	6/ 2/37	3,699.01	3,760.50
Dividend paid June 1, 1937	6/ 1/37	51.75***	
47. 20 shares, Borne Scrymser Co., capital $25. par, at 17½* on date of death. At 13⅛ less brokerage and tax on June 17, 1937 date of sale by Executor	6/17/37	259.19	350.00*
Dividend paid April 15, 1937	4/15/37	15.00**	15.00**
48. 50 shares, Brooklyn Union Gas Company, capital no par, at 38¼ on date of death. At 32⅛ less brokerage and tax on May 13, 1937 date of sale by			
198 Executor	5/13/37	1,594.21	1,912.50
49. 50 shares, Buffalo, Niagara & Eastern Power Company $5. no par, at 102⅝ (dividend reflected) on date of death. At 94 less brokerage and tax on June 21, 1937 date of sale by Executor	6/21/37	4,685.40	5,131.25
Dividend paid May 1, 1937	5/ 1/37	62.50***	
50. 85 shares, Chase National Bank of New York, capital $13.55 par, at 58⅜ on date of death. At 51¾ less tax on June 8, 1937, date of sale by Executor	6/ 8/37	4,394.75	4,961.88

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	Subsequent Valuation Date	Value Under Option	Value on Date of Death
51. 24 shares, Chesebrough Manufacturing Company, consolidated, common $25. par, at 114½ on date of death. At 116¾* less brokerage and tax on June 11, 1937 date of sale by Executor	6/11/37	2,794.68*	2,748.00
Dividend paid June 24, 1937	6/24/37	36.00****	
52. 125 shares, Chicago & Northwestern Railway Company, common $100. par, at 5 on date of death. 100 at 4¼ and 25 at 4⅛ less brokerage and tax on May 24, 1937 date of sale by Executor	5/24/37	509.98	625.00
53. 100 shares, Chrysler Corporation, common $5. par, at 121¾ on date of death			12,175.00
25 shares at 43⅜ less brokerage and tax on March 29, 1938 date of sale by Executor	3/29/38	1,079.00	
75 shares at 41 on April 3, 1938. Not disposed of within year following death	4/ 3/38	3,075.00	
Dividend paid June 11, 1937	6/11/37	200.00***	
Dividend paid September 10, 1937	9/10/37	350.00***	
Dividend paid December 18, 1937	12/13/37	300.00***	
54. 200 shares, Columbia Gas & Electric Corporation, 6% Cumulative Preferred, A, at 97¼ (dividend reflected) on date of death			19,450.00
50 shares, at 69⅞ less brokerage and tax on March 29, 1938 date of sale by Executor	3/29/38	3,479.68	
150 shares at 67 on April 3, 1938. Not disposed of within year following death	4/ 3/38	10,050.00	
Dividend paid May 15, 1937	5/15/37	300.00***	
Dividend paid August 16, 1937	8/16/37	300.00***	
Dividend paid November 15, 1937	11/15/37	300.00***	
Dividend paid February 15, 1939	2/15/38	300.00***	

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		Subsequent Valuation Date	Value Under Option	Value on Date of Death
202	55. 200 shares, Consolidated Edison Company of New York, Inc., $5. Cumulative Preferred no par, at 105* on date of death. At 90¾* on April 3, 1938. Not disposed of within year following death	4/ 3/38	18,150.00*	21,000.00*
	Dividend paid May 1, 1937	5/ 1/37	250.00**	250.00**
	Dividend paid August 2, 1937	8/ 2/37	250.00***	
	Dividend paid November 1, 1937	11/ 1/37	250.00***	
	Dividend paid February 1, 1938	2/ 1/38	250.00***	
203	Dividend paid May 2, 1938	5/ 2/38	250.00****	
	56. 2,255 shares, Consolidated Edison Company of New York, Inc., common no par at 30½ on date of death			89,072.50
	200 shares, at 34½ and 55 shares at 34⅜ less brokerage and tax on July 8, 1937 date of sale by Executor	7/ 8/37	8,729.25	
	400 shares, at 35¾ less brokerage and tax on August 24, 1937 date of sale by Executor	8/24/37	14,203.70	
	400 shares, at 19 less brokerage and tax on March 30, 1938 date of sale by Executor	3/30/38	7,515.84	
204	1,200 shares, at 19¼ on April 3, 1938. Not disposed of within year following death	4/ 3/38	23,100.00	
	Dividend paid June 15, 1937 on 2,255 shares	6/15/37	1,127.50***	
	Dividend paid September 15, 1937 on 2,000 shares	9/15/37	1,000.00***	
	Dividend paid December 15, 1937 on 1,600 shares	12/15/37	800.00***	
	Dividend paid March 15, 1938 on 1,600 shares	3/15/38	800.00***	
	57. 87 shares, Consolidated Oil Corporation, common no par, at 17½ (dividend reflected) on			

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	Subsequent Valuation Date	Value Under Option	Value on Date of Death	
date of death. At 15½ less brokerage and tax on June 14, 1937 date of sale by Executor	6/14/37	1,331.50	1,522.50	205
Dividend paid May 15, 1937	5/15/37	17.40***		
58. 100 shares, Corn Products Refining Company, $7. Cumulative preferred $100. par, at 156½* on date of death. At 160½* less brokerage and tax on October 13, 1937 date of sale by Executor	10/13/37	16,015.67*	15,650.00*	
Dividend paid April 15, 1937	4/15/37	175.00**	175.00**	206
Dividend paid July 15, 1937	7/15/37	175.00***		
Dividend paid October 15, 1937	10/15/37	175.00****		
59. 50 shares, Corn Products Refining Company, common $25. par, at 66⅛* on date of death. At 58⅛ less brokerage and tax on June 17, 1937 date of sale by Executor	6/17/37	2,894.79	3,306.25*	
Dividend paid April 20, 1937	4/20/37	37.50**	37.50**	
60. 100 shares, Duquesne Light Company, 5% Cumulative 1st Preferred $100. par, at 113⅜* on date of death. 30 shares at 112¾* and 70 shares at 112½* less brokerage and tax on July 13, 1937 date of sale by executor	7/13/37	11,223.27*	11,337.50*	207
Dividend paid April 15, 1937	4/15/37	125.00**	125.00**	
Dividend paid July 15, 1937	7/15/37	125.00****		
61. 314 shares, E. I. duPont de Nemours & Company, 6% non voting debenture $100. par, at 134½ (dividend reflected) on date of death			42,233.00	
14 shares, at 130⅞ less brokerage and tax on June 28, 1937 date of sale by Executor	6/28/37	1,827.45		

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		Subsequent Valuation Date	Value Under Option	Value on Date of Death
208	200 shares, at 131 and 100 shares at 132 less brokerage and tax on November 16, 1937 date of sale by Executor	11/16/37	39,297.20	
	Dividend paid April 24, 1937 on 314 shares	4/24/37	471.00***	
	Dividend paid July 26, 1937 on 300 shares	7/26/37	450.00***	
	Dividend paid October 25, 1937 on 300 shares	10/25/37	450.00***	
209	62. 50 shares, Eastman Kodak Company, common no par, at 163 on date of death. At 168⅜* less brokerage and tax on June 9, 1937 date of sale by Executor	6/ 9/37	8,401.58*	8,150.00
	Dividend paid July 1, 1937	7/ 1/37	100.00****	
	63. 300 shares, Electric Bond and Share Company, $6. Cumulative preferred no par, at 80⅝ (dividend reflected) on date of death			24,187.50
	75 shares at 45¾ less brokerage and tax on March 29, 1938 date of sale by Executor	3/29/38	3,413.18	
210	225 shares, at 47 (dividend reflected) on April 3, 1938. Not disposed of within year following death	4/ 3/38	10,575.00	
	Dividend paid May 1, 1937	5/ 1/37	450.00***	
	Dividend paid August 2, 1937	8/ 2/37	450.00***	
	Dividend paid November 1, 1937	11/ 1/37	450.00***	
	Dividend paid February 1, 1938	2/ 1/38	450.00***	
	64. 50 shares, First National Stores, Inc., common no par, at 47 on date of death. At 41 less brokerage and tax on June 8, 1937 date of sale by Executor	6/ 8/37	2,037.95	2,350.00

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	Subsequent Valuation Date	Value Under Option	Value on Date of Death
5. 100 shares, General Cigar Company, Inc., common no par, at 45½ on date of death. At 39¼ less brokerage and tax on July 13, 1937 date of sale by Executor	7/13/37	3,900.92	4,550.00
Dividend paid May 1, 1937	5/ 1/37	100.00***	
6. 200 shares, General Electric Company, common no par, at 56½* on date of death. At 31¼* on April 3, 1938. Not disposed of within year following death	4/ 3/38	6,250.00*	11,300.00*
Dividend paid April 26, 1937	4/26/37	80.00**	80.00**
Dividend paid July 26, 1937	7/26/37	80.00***	
Dividend paid October 25, 1937	10/25/37	80.00***	
Dividend paid December 20, 1937	12/20/37	200.00***	
Dividend paid April 25, 1938	4/25/38	60.00****	
7. 50 shares, General Foods Corporation, common no par, at 42⅛ on date of death. At 39 less brokerage and tax on June 8, 1937 date of sale by Executor	6/ 8/37	1,937.96	2,106.25
Dividend paid May 15, 1937	5/15/37	25.00***	
8. 300 shares, General Motors Corporation, common $10. par, at 61⅛ on date of death. At 51⅛ less brokerage and tax on September 21, 1937 date of sale by Executor	9/21/37	15,271.19	18,337.50
Dividend paid June 12, 1937	6/12/37	300.00***	
Dividend paid September 13, 1937	9/13/37	300.00***	
9. 30 shares, Great Northern Iron Ore Properties, Trustees Certificate of Beneficial Interest, no par, at 26 on date of death. At 21⅛ less brokerage and tax on May 18, 1937 date of sale by Executor	5/18/37	627.30	780.00

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	Subsequent Valuation Date	Value Under Option	Value on Date of Death
70. 54 shares, Great Northern Railway Company, $6. non cumulative preferred no par, at 50¼ on date of death. At 53⅞ less brokerage and tax on June 14, 1937 date of sale by Executor	6/14/37	2,894.88	2,713.50
71. 50 shares, Indianapolis Power & Light Company, 6½% preferred $100. par, at 98 on date of death. At 92* less brokerage and tax on June 23, 1937 date of sale by Executor	6/23/37	4,585.40*	4,900.00
215 Dividend paid July 1, 1937	7/ 1/37	81.25****	
72. 108 15/100 shares, International Business Machine Company, capital no par, at 162⅝* on date of death. At 132¼* on April 3, 1938. Not disposed of within year following death	4/ 3/38	14,302.84*	17,587.89*
Dividend paid April 10, 1937	4/10/37	162.00**	162.00**
Dividend paid July 10, 1937	7/10/37	162.00***	
Dividend paid October 9, 1937	10/ 9/37	162.00***	
Dividend paid December 23, 1937	12/23/37	162.00***	
5 40/100 shares received April 1, 1938 as stock dividend, at 132¼ on April 3, 1938	4/ 3/38	714.15A	
216 Dividend paid April 11, 1938	4/11/38	169.50****	
73. 200 shares, International Nickel Company of Canada, Ltd. common no par, at 67¾ on date of death. At 42½ on April 3, 1938. Not disposed of within year following death	4/ 3/38	8,500.00	13,550.00
Dividend paid June 30, 1937 less tax	6/30/37	95.00***	
Dividend paid September 30, 1937 less tax	9/30/37	95.00***	
Dividend paid December 31, 1937 less tax	12/31/37	142.50***	
Dividend paid March 31, 1938 less tax	3/31/38	95.00***	

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	Subsequent Valuation Date	Value Under Option	Value on Date of Death
800 shares, Lanston Monotype Machine Company, capital, $100. par, at 100 on date of death			80,000.00
25 shares at 89 less brokerage and tax on July 28, 1937 date of sale by Executor	7/28/37	2,217.75	
400 shares, at 79 and 75 shares at 80 less brokerage and tax on September 14-15, 1937 dates of sale by Executor	9/14-15/37	37,462.25	
300 shares, at 68½ on April 3, 1938. Not disposed of within year following death	4/ 3/38	20,550.00	
Dividend paid June 1, 1937 on 800 shares	6/ 1/37	800.00***	
Dividend paid August 31, 1937 on 775 shares	8/31/37	775.00***	
Dividend paid November 30, 1937 on 300 shares	11/30/37	300.00***	
Dividend paid February 25, 1938	2/25/38	300.00***	
300 shares, Liggett & Myers Tobacco Company 7% Cumulative Preferred $100. par, at 157¼ on date of death, 200 shares, at 156½ and 100 shares, at 157 less brokerage and tax on July 13, 1937 date of sale by Executor	7/13/37	46,897.05	47,175.00
Dividend paid July 1, 1937	7/ 1/37	525.00***	
100 shares, Liggett & Myers Tobacco Company, common B, $25. par, at 101¾ on date of death. At 83¾ on April 3, 1938. Not disposed of within year following death	4/ 3/38	8,375.00	10,175.00
Dividend paid June 1, 1937	6/ 1/37	100.00***	
Dividend paid September 1, 1937	9/ 1/37	100.00***	
Dividend paid December 1, 1937	12/ 1/37	100.00***	
Dividend paid December 22, 1937	12/22/37	200.00***	
Dividend paid March 1, 1938	3/ 1/38	100.00***	

Exhibit A, Annexed to Stipulation of Facts.

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	Subsequent Valuation Date	Value Under Option	Value on Date of Death
77. 500 shares, Manhattan Railway Co. Modified Guaranteed Consolidated $100. par, at 11⅜ on date of death. 200 shares, at 9⅜, 200 shares at 9¼ and 100 shares at 8⅞ less brokerage and tax on May 18-19, 1937 dates of sale by Executor	5/18-19/37	4,539.90	5,687.50
78. 150 shares, Mississippi River Power Company 6% Cumulative Preferred $100. par, at 114⅜ on date of death. At 109 less brokerage and tax on August 3, 1937 date of sale by Executor	8/ 3/37	16,298.89	17,156.25
221 Dividend paid July 1, 1937	7/ 1/37	225.00***	
79. 100 shares, Monsanto Chemical Company, common $10. par, at 90 on date of death. At 96¼ less brokerage and tax on July 13, 1937 date of sale by Executor	7/13/37	9,600.30	9,000.00
Dividend paid June 15, 1937	6/15/37	50.00***	
80. 250 shares, Morris & Essex Railroad Company, capital $50. par, at 63¾ on date of death. 210 shares at 60 and 40 shares, at 59¼ less tax on May 18, 1937 date of sale by Executor	5/18/37	14,953.75	15,937.50
222			
81. 100 shares, National Biscuit Company, 7% Cumulative Preferred $100. par, at 149½ on date of death. At 149½ less brokerage and tax on July 21, 1937 date of sale by Executor	7/21/37	14,915.70	14,950.00
Dividend paid May 29, 1937	5/29/37	175.00***	

Exhibit A, Annexed to Stipulation of Facts.

	Subsequent Valuation Date	Value Under Option	Value on Date of Death
2. 100 shares, National Biscuit Company, common $10. par, at 29¼* on date of death. At 23¼* less brokerage and tax on June 29, 1937 date of sale by Executor	6/29/37	2,307.95*	2,925.00*
Dividend paid April 15, 1937	4/15/37	40.00**	40.00**
Dividend paid July 15, 1937	7/15/37	40.00****	
3. 50 shares, New York Air Brake Company, Inc. common no par, at 86½ on date of death. At 81⅞* less brokerage and tax on May 24, 1937 date of sale by Executor	5/24/37	4,079.16*	4,325.00
Dividend paid June 1, 1937	6/ 1/37	25.00****	
4. 90 shares, New York Central Railroad Company, capital no par, at 50⅛ on date of death. At 39⅝ less brokerage and tax on June 17, 1937 date of sale by Executor	6/17/37	3,544.57	4,511.25
Proceeds of sale of 90 rights	4/27/37	36.56B	
5. 190 shares, New York, Chicago & St. Louis Railroad Company, 6% Cumulative preferred Series A, $100. par, at 91¼ on date of death. 100 shares at 80 and 90 shares at 79⅞ less brokerage and tax on July 1, 1937 date of sale by Executor	7/ 1/37	15,133.34	17,337.50
6. 200 shares, New York Telephone Company, 6½% Cumulative preferred $100. par, at 110* on date of death. At 111.55 less tax on May 13, 1937 date of sale by Executor	5/13/37	22,292.00	22,000.00*
Dividend paid April 15, 1937	4/15/37	325.00**	325.00**

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Exhibit A, Annexed to Stipulation of Facts.

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	Subsequent Valuation Date	Value Under Option	Value on Date of Death
87. 100 shares, North American Edison Company, $6. Cumulative preferred no par, at 100 (dividend reflected) on date of death. At 97 less brokerage and tax on October 13, 1937 date of sale by Executor	10/13/37	9,670.80	10,000.00
Dividend paid June 1, 1937	6/ 1/37	150.00***	
Dividend paid September 1, 1937	9/ 1/37	150.00***	
88. 100 shares, North Birmingham Land Company, Capital $1. par, at 1 on date of death. At 1 less tax and exchange on August 23, 1937 date of sale by Executor	8/23/37	99.71	100.00
89. 48 shares, Northern Pacific Railway Company, capital $100. par, at 32 on date of death. At 33⅝ less brokerage and tax on June 8, 1937 date of sale by Executor	6/ 8/37	1,602.44	1,536.00
90. 180 shares, Ohio Oil Company, Inc., common no par, at 22¼ on date of death. 100 shares at 18⅛ and 80 shares at 18 less brokerage and tax on June 29, 1937 date of sale by Executor	6/29/37	3,217.33	4,005.00
Dividend paid June 15, 1937	6/15/37	90.00***	
91. 100 shares, Parke Davis & Co., capital no par, at 38⅝ on date of death. At 38 less brokerage and tax on May 28, 1937 date of sale by Executor	5/28/37	3,775.92	3,862.50
92. 200 shares, Pennsylvania Railroad Company, capital $50. par, at 46⅞ on date of death			9,375.00

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Exhibit A, Annexed to Stipulation of Facts.

		Subsequent Valuation Date	Value Under Option	Value on Date of Death	
	50 shares, at 15⅞ less brokerage and tax on March 29, 1938 date of sale by Executor	3/29/38	784.23		229
	150 shares, at 15⅞ on April 3, 1938. Not disposed of within year following death	4/ 3/38	2,381.25		
	Dividend paid July 22, 1937	7/22/37	100.00***		
	Dividend paid December 20, 1937	12/20/37	150.00***		
93.	50 shares, Pere Marquette Railway Company, 5% Cumulative prior preferred $100. par, at 81⅜ on date of death. At 78 less brokerage and tax on June 9, 1937 date of sale by Executor	6/ 9/37	3,885.42	4,068.75	230
94.	250 shares, Public Service Corporation of New Jersey, $5. Cumulative preferred no par, at 103⅛ on date of death. 100 shares at 98, 100 shares at 97 and 50 shares at 97⅞ less brokerage and tax on October 13-14, 1937 dates of sale by Executor	10/13-14/37	24,320.75	25,781.25	
	Dividend paid June 30, 1937	6/30/37	312.50***		
	Dividend paid September 30, 1937	9/30/37	312.50***		
95.	125 shares, Pullman, Inc., capital no par, at 61¼ (dividend reflected) on date of death. 100 shares at 52¼ and 25 shares at 52⅛ less brokerage and tax on July 1, 1937 date of sale by Executor	7/ 1/37	6,494.86	7,656.25	231
	Dividend paid May 15, 1937	5/15/37	46.88***		
96.	50 shares, Shell Union Oil Corporation, 5½% Cumulative Convertible preferred $100. par, at 103⅜ on date of death.				

Exhibit A, Annexed to Stipulation of Facts.

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	Subsequent Valuation Date	Value Under Option	Value on Date of Death
At 104⅛ less brokerage and tax on June 14, 1937 date of sale by Executor	6/14/37	5,189.14	5,168.75
97. 900 shares, Socony Vacuum Oil Company, Inc., capital $15. par, at 19¼ on date of death. At 12⅛ on April 3, 1938. Not disposed of within year following death	4/ 3/38	10,912.50	17,325.00
Dividend paid September 15, 1937	9/15/37	225.00***	
Dividend paid December 15, 1937	12/15/37	270.00***	
233 Dividend paid March 15, 1938	3/15/38	225.00***	
98. 18 shares, South Penn Oil Company, Capital $25. par, at 44 on date of death. At 42¾ less brokerage and tax on May 25, 1937 date of sale by Executor	5/27/37	765.81	792.00
99. 50 shares, Southern Pacific Company, capital $100. par, at 60¼ on date of death. At 52⅛ less brokerage and tax on June 8, 1937 date of sale by Executor	6/ 8/37	2,592.94	3,012.50
100. 100 shares, Southern Railway Company, 5% Non-Cumulative Preferred $100. par, at 53⅝ on date of death. At 45 less brokerage and tax on July 13, 1937 date of sale by Executor	7/13/37	4,475.91	5,362.50
234 101. 100 shares, Southern Railway Company, common $100. par at 40 on date of death. At 32½ less brokerage and tax on July 13, 1937 date of sale by Executor	7/13/37	3,225.93	4,000.00

Exhibit A, Annexed to Stipulation of Facts.

	Subsequent Valuation Date	Value Under Option	Value on Date of Death	
				235
2. 50 shares, Standard Brands Inc., common no par, at 14⅞ on date of death. At 12⅞ less brokerage and tax on May 14, 1937 date of sale by Executor	5/14/37	633.98	743.75	
3. 400 shares, Standard Oil Company of California, capital no par, at 46¾ on date of death. At 27⅛ on April 3, 1938. Not disposed of within year following death	4/ 3/38	10,850.00	18,700.00	
Dividend paid June 15, 1937	6/15/37	180.00***		236
Dividend paid September 15, 1937	9/15/37	180.00***		
Dividend paid December 15, 1937	12/15/37	320.00***		
Dividend paid March 15, 1938	3/15/38	140.00***		
4. 400 shares, Standard Oil Company of Indiana, capital $25. par, at 47 on date of death			18,800.00	
100 shares at 26⅞ less brokerage and tax on March 29, 1938 date of sale by Executor	3/29/38	2,667.19		
300 shares at 26⅝ on April 3, 1938. Not disposed of within year following death	4/ 3/38	7,987.50		
Dividend paid June 15, 1937	6/15/37	160.00***		
Dividend paid September 15, 1937	9/15/37	200.00***		
Dividend paid December 15, 1937	12/15/37	400.00***		237
Dividend paid March 15, 1938	3/15/38	100.00***		
5. 16 shares, Standard Oil Company of Kansas, capital $10. par, at 31 on date of death. At 30⅝ less brokerage and tax on May 18, 1937 date of sale by Executor	5/18/37	486.85	496.00	
6. 247 shares, Standard Oil Company of Kentucky, capital $10. par at 20 on date of death.				

Exhibit A, Annexed to Stipulation of Facts.

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		Subsequent Valuation Date	Value Under Option	Value on Date of Death
	200 shares at 19⅛ and 47 shares at 18⅞ less brokerage and tax on July 2, 1937 date of sale by Executor	7/ 2/37	4,672.74	4,940.00
	Dividend paid June 15, 1937	6/15/37	98.80***	
107.	18 shares, Standard Oil Company of Nebraska, capital $25. par, at 13⅝ on date of death. At 11¼ less brokerage and tax on June 9, 1937 date of sale by Executor	6/ 9/37	199.50	245.25

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108.	1,000 shares, Standard Oil Company of New Jersey, capital $25. par, at 71¼ on date of death			71,250.00
	400 shares at 65½ less brokerage and tax on June 29, 1937 date of sale by Executor	6/29/37	26,108.47	
	600 shares at 43½ on April 3, 1938. Not disposed of within year following death	4/ 3/38	26,100.00	
	Dividend paid June 15, 1937 on 1,000 shares	6/15/37	1,250.00***	
	Dividend paid December 15, 1937 on 600 shares	12/15/37	750.00***	

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109.	19 shares, Standard Oil Company of Ohio, capital $25. par at 43 on date of death. At 35¾ on May 24, 1937 date of sale by Executor	/24/37	675.37	817.00
110.	200 shares, Texas Gulf Sulphur Company, capital no par, at 41½ on date of death. At 34¾ less brokerage and tax on July 2, 1937 date of sale by Executor	7/ 2/37	6,901.86	8,300.00
	Dividend paid June 15, 1937	6/15/37	150.00***	

Exhibit A, Annexed to Stipulation of Facts.

	Subsequent Valuation Date	Value Under Option	Value on Date of Death
0 shares, Union Carbide & Carbon Corporation, capital no par, at 102 on date of death. At 63½ on April 3, 1938. Not disposed of within year following death	4/ 3/38	19,050.00	30,600.00
vidend paid July 1, 1937	7/ 1/37	240.00***	
vidend paid October 1, 1937	10/ 1/37	240.00***	
vidend paid January 3, 1938	1/ 3/38	240.00***	
vidend paid April 1, 1938	4/ 1/38	240.00***	
shares, Union Pacific Railroad Company, 4% non-cumulative preferred $100. par, at 94 on date of death. At 92⅝ less brokerage and tax on June 8, 1937 date of sale by Executor	6/ 8/37	8,125.31	8,272.00
0 shares, Union Pacific Railroad Company, common $100. par, at 144½ on date of death			21,675.00
shares at 61¾* less brokerage nd tax on March 29, 1938 date f sale by Executor	3/29/38	2,335.81*	
2 shares at 60 on April 3, 1938. Not disposed of within year following death	4/ 3/38	6,720.00	
vidend paid July 1, 1937	7/ 1/37	225.00***	
vidend paid October 1, 1937	10/ 1/37	225.00***	
vidend paid January 3, 1938	1/ 3/38	225.00***	
vidend paid April 1, 1938 on 112 shs.	4/ 1/38	168.00***	
vidend paid April 1, 1938 on 38 shs.	4/ 1/38	57.00****	
shares, Union Tank Car Company, capital no par, at 29 on date of death. At 28⅝ less brokerage and tax on May 14, 1937 date of sale by Executor	5/14/37	567.68	580.00

Exhibit A, Annexed to Stipulation of Facts.

		Subsequent Valuation Date	Value Under Option	Value on Date of Death
244				
115.	100 shares, United Fruit Company, capital no par, at 85¼* on date of death. At 64 less brokerage and tax on September 14, 1937 date of sale by Executor	9/14/37	6,373.37	8,525.00*
	Dividend paid April 15, 1937	4/15/37	75.00**	75.00**
	Dividend paid July 15, 1937	7/15/37	75.00***	
116.	200 shares, United Gas Improvement Company $5. Cumulative Preferred no par, at 111¼ on			
245	date of death. At 105 less brokerage and tax on October 13, 1937, date of sale by Executor	10/13/37	20,931.58	22,250.00
	Dividend paid June 30, 1937	6/30/37	250.00***	
	Dividend paid September 30, 1937	9/30/37	250.00***	
117.	100 shares, United States Rubber Company 8% Cumulative 1st preferred $100. par, at 104⅝ on date of death. At 87 less brokerage and tax on May 18, 1937 date of sale by Executor	5/18/37	8,670.80	10,462.50
118.	700 shares, United States Steel Corporation, 7% Cumulative			
246	Preferred $100. par, at 144½ on date of death			101,150.00
	100 shares, at 130* less brokerage and tax on July 12, 1937 date of sale by Executor	7/12/37	12,965.74*	
	100 shares at 130¼* less brokerage and tax on August 24, 1937 date of sale by Executor	8/24/37	12,990.73*	
	200 shares, at 109½* less brokerage and tax on November 19, 1937 date of sale by Executor	11/19/37	21,831.56*	
	300 shares, at 98⅞ on April 3, 1938. Not disposed of within year following death	4/ 3/38	29,662.50	

Exhibit A, Annexed to Stipulation of Facts.

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	Subsequent Valuation Date	Value Under Option	Value on Date of Death
Dividend paid May 29, 1937 on 700 shares	5/29/37	4,025.00***	
Dividend paid June 29, 1937 on 700 shares	6/29/37	1,400.00***	
Dividend paid July 30, 1937 on 700 shares	7/30/37	200.00**** 1,200.00***	
Dividend paid August 30, 1937 on 600 shares	8/30/37	300.00**** 1,500.00***	
Dividend paid November 20, 1937 on 500 shares	11/20/37	350.00**** 525.00***	
Dividend paid February 19, 1938 on 500 shares	2/19/38	525.00***	
119. 50 shares, West Penn Power Company, 7% Cumulative Preferred $100. par, at 120* on date of death. 30 shares at 120½ and 20 shares at 120 less brokerage and tax on June 8, 1937 date of sale by Executor	6/ 8/37	5,997.87	6,000.00*
Dividend paid May 1, 1937	5/ 1/37	87.50**	87.50**
120. 100 shares, Westinghouse Electric & Manufacturing Company, common $50. par, at 140½ on date of death. At 147½ less brokerage and tax on July 13, 1937 date of sale by Executor	7/13/37	14,718.20	14,050.00
Dividend paid June 1, 1937	6/ 1/37	100.00***	

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WORTHLESS SECURITIES

121. $3,000. Chicago, Rock Island and Pacific Railroad Company, 4%, due November 1, 2002 (stamped)	4/ 3/38	—0—	—0—
122. $10,000. United States Reduction and Refining Company, 6% Sinking Fund 1st Mortgage, due July 1, 1931 (Stamped)	"	—0—	—0—
10 shares, American Cigarette Machine Company, capital $100. par	"	—0—	—0—

Exhibit A, Annexed to Stipulation of Facts.

		Subsequent Valuation Date	Value Under Option	Value on Date of Death
250				
	123. 500 shares, Electrical Lead Reduction Company, capital, $50. par	"	—0—	—0—
	124. 18 shares, Land & River Company, common $100. par	"	—0—	—0—
	125. 1 share, Land & River Company, 6% 1st Preferred $100. par	"	—0—	—0—
	126. 10 shares, Ohio & Indiana Consolidated Natural and Illuminating Gas Company, Capital $100. par	"	—0—	—0—
251	127. 50 shares, Spring Valley Gold Company, Capital $5. par	"	—0—	—0—
	128. 50 shares, West Side Construction Company, Capital $100. par	"	—0—	—0—
	129. 200 shares, White Knob Copper Company, Ltd., Capital $10 par	"	—0—	—0—
	130. 2 shares, Societe Metallurgie-Electro Thermique, par 25 frs.	"	—0—	—0—
	131. 6 shares, Societe Civile de Hauts Fourneaux Electriques au Chile	"	—0—	—0—
	132. Less items of dividends and interest here in controversy (dividends declared and interest earned between date of death and subsequent valuation date under option)			
252			54,578.60C	

Exhibit A, Annexed to Stipulation of Facts.

The following note appears at the end of Schedule B of the estate tax 253
eturn. The respondent does not concede the correctness of the statements
ontained therein:

> The items represented by the latter figure, to wit, $54,578.60 are returned in this schedule for information purposes only and in the form required by Regulations 80, 1937 Edition. They are not included in the gross estate for the reason that the Revenue Act of 1926, as amended, and specifically 302 J thereof added by Section 202 of the Revenue Act of 1935 does not require the inclusion of said items and the provisions of Regulations 80, 1937 Edition, which purport to require their inclusion, are contrary to the express provisions of the said Revenue Act, as amended.

* These quotations are "ex dividend".
** Dividend declared before date of death and payable to stockholders of record 254
before date of death.
*** Dividend payable and paid after date of death and before optional valuation date to stockholders of record after date of death.
*** Dividend payable after optional valuation date to stockholders of record after date of death and before optional valuation date.
x Interest accrued but not due at date of death.
xx Interest accrued after date of death to optional valuation date. Not due at latter date but collected from purchaser on sale or from obligor on redemption.
xxx Interest accrued and paid after date of death and before optional valuation date.
xxx Interest accrued and paid after date of death to optional valuation date but not due at latter date.

A. This stock dividend of the value of $714.15 was included by the petitioner in he items amounting to $54,578.60 originally in dispute. The petitioner now concedes hat such stock dividend is includible in the gross estate for estate tax purposes, eaving $53,864.45 in dispute. Such concession is made by the petitioner because such tock dividend is a true stock dividend and not an income item and in order to avoid ny controversy as to the proper treatment of such item for estate tax purposes.

B. The proceeds of the sale of stock rights amounting to $36.56 were included by he petitioner in the gross estate on the estate tax return and is not in dispute here. 255

C. This amount includes the stock dividend referred to in Footnote A, which is no nger in issue.

The term "dividend reflected" means that a dividend had been declared prior to the late shown but was payable to stockholders of record on a subsequent date.

Opinion.

256

UNITED STATES BOARD OF TAX APPEALS.

ESTATE OF CORDELIA Y. ABENDROTH, CITY BANK FARMERS TRUST COMPANY, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF CORDELIA Y. ABENDROTH, DECEASED, PETITIONER, *v.* COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

ESTATE OF KATE READ BLACQUE, CITY BANK FARMERS TRUST COMPANY, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF KATE READ BLACQUE, DECEASED, PETITIONER, *v.*
257 COMMISSIONER OF INTERNAL REVENUE, RESPONDENT.

Docket Nos. 94755, 97857. Promulgated May 17, 1940.

Where executor elects optional valuation date (sec. 202 (a), Revenue Act of 1935), income of estate prior to such valuation date must be included in gross estate.

James D. Ouchterloney, Esq., George H. Craven, Esq., and *Earle J. Starkey, Esq.,* for the petitioners.

E. O. Hanson, Esq., and *Benjamin M. Brodsky, Esq.,* for the respondent.

258 OPPER: These proceedings were brought for a redetermination of deficiencies in estate tax. In Docket No. 94755 the amount of the deficiency assailed is $432.83; in Docket No. 97857 the amount is $13,996.28. The dates of death were October 9, 1936, and April 3, 1937, respectively.

The sole question presented by both cases is whether, upon an election by an executor to exercise the option given in section 302 (j) of the Revenue Act of 1926, as added by section 202 (a) of the Revenue Act of 1935, to value the estate as of a date subsequent to decedent's

death, there must be included in the gross estate the income thereon between the date of death and the optional valuation date. 259

All the facts in both proceedings have been stipulated. They are hereby found accordingly.

The stipulations show that in each case the executors elected upon the return to have the gross estate valued at the optional valuation dates provided by the section referred to. As permitted by that provision, retained assets were valued as of one year after decedent's death, and those disposed of in the interim were valued as of the date of disposition.

Respondent included in the respective gross estates items of income consisting of interest and dividends, collected or accruing between the date of death and the optional valuation date. The deficiency resulting from that adjustment is the subject of this controversy. 260

The question presented here was considered by the Court of Appeals, Second Circuit, in *Saks* v. *Higgins*, —— Fed. (2d) ——, (Apr. 8, 1940) and was there answered in the affirmative. On the authority of that decision, respondent's inclusion in the gross estate of the interim estate income is sustained.

Reviewed by the Board.

Decision will be entered for the respondent. 261

BLACK, dissenting: Undoubtedly the Commissioner in determining the deficiencies in each of these proceedings was following article 11 of Treasury Regulations 80 (1937 Edition). If the provisions of these regulations which require interest earned after decedent's death and ordinary dividends declared and paid after decedent's death to be included in the value of decedent's state are

262 valid, then, of course, the majority opinion is correct. However, it seems to us that the regulations clearly go beyond the statute. A regulation which goes beyond the statute is invalid and should not be enforced. *Manhattan General Equipment Co.* v. *Commissioner,* 297 U. S. 129, and cases there cited.

Under the terms of section 302 of the Revenue Act of 1926, the value of the property which is to be included in decedent's gross estate is the value of such property at the time of decedent's death. Subdivision (j), which was added by the Revenue Act of 1935, did not change in the slightest degree the property which was to be included
263 in decedent's estate. It simply postponed the date at which such property was to be valued, if the executor of the estate elected to avail himself of such privilege. Of course, if any particular piece of property increases in value between the date of decedent's death and the date of the postponed valuation, the increase in value must be taken into account, but nevertheless, it is the same property. Interest earned after decedent's death and ordinary dividends declared and paid after decedent's death, are not items of property on hand at decedent's death. They are not items which represent mere increase in value. They are items of property which have been acquired by the estate since decedent's death and are
264 taxable income to the estate. We see nothing in the language of section 302 (j) which would indicate that Congress intended that such items of newly acquired property should be added to decedent's gross estate merely because the valuation date is postponed for one year. A perusal of the statement of the managers on the part of the House which accompanied the Conference Report on the Revenue Bill of 1935 (74th Cong., 1st sess., H. R. 8974, Conference Report No. 1885, pp. 10-11), seems to indicate to the contrary.

We recognize, of course, that the views which we have

herein expressed are contrary to *Saks* v. *Higgins*, —— 265
Fed. (2d) —— (Apr. 8, 1940), cited in the majority opinion. While we have great respect for the views of the learned court which handed down that decision, we are compelled, for reasons we have already stated, to differ from the majority opinion of that court, and to file our dissent in this proceeding.

VAN FOSSAN, ARNOLD, and HARRON agree with this dissent.

Decision.

UNITED STATES BOARD OF TAX APPEALS, 266

WASHINGTON.

Docket No. 94755.

ESTATE OF CORDELIA Y. ABENDROTH, CITY BANK FARMERS TRUST COMPANY, as Executor of the Last Will and Testament of Cordelia Y. Abendroth, Deceased,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent. 267

Pursuant to the determination of the Board, as set forth in its Opinion, promulgated May 17, 1940, it is

ORDERED AND DECIDED: That there is a deficiency of $432.83 in estate tax.

Enter:

(Signed) C. R. ARUNDELL,
Member.

268 **Decision.**

UNITED STATES BOARD OF TAX APPEALS,

WASHINGTON.

Docket No. 97857.

ESTATE OF KATE READ BLACQUE, CITY BANK FARMERS TRUST COMPANY, as Executor of the Last Will and Testament of Kate Read Blacque, Deceased,

Petitioner,

v.

269 COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Pursuant to the determination of the Board, as set forth in its Opinion, promulgated May 17, 1940, it is

ORDERED AND DECIDED: That there is a deficiency of $13,996.28 in estate tax.

Enter:

270 (Signed) C. R. ARUNDELL,
Member.

Petition for Review.

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IN THE
UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE SECOND CIRCUIT.

Board of Tax Appeals, Docket No. 94755.

ESTATE OF CORDELIA Y. ABENDROTH, CITY BANK FARMERS TRUST COMPANY, as Executor of the Last Will and Testament of Cordelia Y. Abendroth, Deceased,
Petitioner,

—against—

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COMMISSIONER OF INTERNAL REVENUE,
Respondent.

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

The petition of City Bank Farmers Trust Company, as executor of the last will and testament of Cordelia Y. Abendroth, deceased, respectfully shows:

I.

273

City Bank Farmers Trust Company is a corporation duly organized under the banking laws of the State of New York and is engaged in said state in the business of a trust company, with its principal office and place of business at No. 22 William Street, New York, N. Y. The said Cordelia Y. Abendroth died on October 9, 1936, a citizen of the United States residing at Harrison, Westchester County, New York, leaving a last will and testament which was duly admitted to probate by the Surrogate's Court of Westchester County, New York, on Octo-

274 ber 16, 1936. On the last mentioned date letters testamentary were duly issued by said Court to said City Bank Farmers Trust Company, the executor named in said will, which since said date has been and is now the duly appointed, qualified and acting executor of said last will and testament and which, as such executor, is the petitioner herein.

The respondent is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, appointed and holding office by virtue of the laws of the United States.

The Federal estate tax return of the estate of said
275 decedent was duly filed by the petitioner on November 24, 1937, with the United States Collector of Internal Revenue for the Fourteenth District of New York, Albany, N. Y. The court in which the review of this proceeding is sought is the Circuit Court of Appeals for the Second Circuit, the circuit in which is located the office of said Collector.

II.

The nature of the controversy is as follows:

The petitioner elected on said Federal estate tax return to have the value of the gross estate of said decedent de-
276 termined by valuing all the property included therein on the date of the decedent's death as of the date one year after death, or on the other applicable valuation dates in the case of property distributed, sold, exchanged or otherwise disposed of between the date of death and the date one year after death, pursuant to the provisions of Section 302 (j) of the Revenue Act of 1926, as added by Section 202 (a) of the Revenue Act of 1935. During the period of one year after the death of said decedent the petitioner received in cash (1) interest of $1,417.70 which accrued after the date of death on bonds owned by the

decedent at the time of her death and retained by the 277
petitioner until the expiration of said one-year period; (2) interest of $60.77 which accrued after the date of death on bonds owned by the decedent on the date of death but sold or redeemed within the one-year period, and which interest was received from the purchaser on sale or the obligor on redemption; and (3) dividends of $1,829.40 on stocks owned by the decedent at the date of death which were payable to stockholders of record as of a date subsequent to that date. In addition thereto, on the date one year after the decedent's death, interest of $314.79 had accrued but was not due on bonds owned by the decedent on the date of death, and dividends of 278
$161.25 had been declared on stocks owned by the decedent on the date of death but were payable subsequent to one year after the date of death to stockholders of record as of a date within the period of one year after the date of death. Those five items of interest and dividends, amounting to $3,783.91, were disclosed by the petitioner on said return for purposes of information but were not included in the gross estate for estate tax purposes.

The respondent on April 3, 1939, issued a notice of deficiency setting forth his final determination of the estate tax liability of said estate and therein determined that, in addition to the assets owned by the decedent on the date of her death, there should be included in said gross estate 279
the said items of income accruing or arising after the date of death, amounting to $3,783.91, and on the basis of such determination determined that there was a deficiency of $432.83 in the estate tax on said estate.

The petitioner on July 16, 1938, filed a petition with the United States Board of Tax Appeals appealing from such determination. On motion duly made by the petitioner and granted by the Board, the proceeding so instituted was consolidated with a proceeding instituted by City Bank Farmers Trust Company, as executor of the last will and

280 testament of Kate Read Blacque, deceased, Board of Tax Appeals Docket No. 97857, and on September 29, 1939, said consolidated proceedings were submitted to the Board on the pleadings and a stipulation of facts. On May 17, 1940, the Board rendered its opinion in said proceedings in which it sustained the respondent's said determination, and on May 18, 1940, the Board entered its decision determining that there is a deficiency of $432.83 in the estate tax on said estate.

III.

281 The petitioner, as a basis for such review, makes the following assignment of errors committed by the United States Board of Tax Appeals:

1. The Board erred in holding that where the executor of a decedent's estate elects upon the estate tax return, pursuant to the provisions of Section 302 (j) of the Revenue Act of 1926, as added by Section 202 (a) of the Revenue Act of 1935, to have the gross estate valued as of the date one year after death or other optional valuation dates specified in said section, there must be included as part of the gross estate income consisting of interest and dividends accruing or arising after the date of death, and
282 in failing and refusing to hold that such items of income should be excluded from the gross estate.

2. The Board erred in holding that said items of interest and dividends amounting to $3,783.91, which accrued or arose wholly after the decedent's death, or any part thereof, was part of the property included in the decedent's gross estate on the date of her death and in failing and refusing to hold that such interest and dividends were not part of such property on the date of death.

3. The Board erred in holding that said items of interest and dividends amounting to $3,783.91, or any part thereof, was part of the decedent's gross estate for estate tax purposes, and in failing and refusing to hold that said items should be excluded from such gross estate. 283

4. The Board erred in determining that there is a deficiency of $432.83, or any other amount, in the estate tax on said estate, and in failing and refusing to hold that there is no deficiency in such tax.

WHEREFORE, the petitioner prays that the decision of the United States Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Second Circuit; that a transcript of the record be prepared in accordance with the law and rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court. 284

ROLLIN BROWNE,
JAMES D. OUCHTERLONEY,
GEORGE CRAVEN,
Attorneys for Petitioner,
20 Exchange Place,
New York, N. Y. 285

MITCHELL, TAYLOR, CAPRON & MARSH,
20 Exchange Place,
New York, N. Y.,
Of Counsel.

State of New York,
County of New York—ss.:

GEORGE CRAVEN, being duly sworn, deposes and says that he is one of the attorneys and counsel of record for the petitioner in the above-entitled case; that as such attorney and counsel he is duly authorized to verify the petition for review by the United States Circuit Court of Appeals for the Second Circuit of the decision of the United States Board of Tax Appeals in the proceeding described in the foregoing petition; that he has read the said petition and knows the contents thereof, and that the facts set forth therein are true to the best of his knowledge, information and belief.

GEORGE CRAVEN.

Subscribed and sworn to before me
this 2nd day of July, 1940.

BERTHA BUSSELL,
Notary Public,
Bronx County.
Bronx Co. Clk's No. 135, Reg. No. 108B42.
N. Y. Co. Clk's No. 450, Reg. No. 2B327.
Kings Co. Clk's No. 222, Reg. No. 2233.
Commission expires March 30, 1942.
(Notary Seal)

Notice of Filing of Petition for Review. 289

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

Board of Tax Appeals, Docket No. 94755.

ESTATE OF CORDELIA Y. ABENDROTH, CITY BANK FARMERS TRUST COMPANY, as Executor of the Last Will and 290
Testament of Cordelia Y. Abendroth, Deceased,

Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

To the Commissioner of Internal Revenue:

291

You are hereby notified that the petitioner City Bank Farmer's Trust Company, as executor of the last will and testament of Cordelia Y. Abendroth, deceased, did on the 5th day of July, 1940, file with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit of the decision of the Board of Tax Appeals heretofore entered in the above-entitled case. A copy of the petition for review, together

292 with the assignment of errors, as filed, is attached hereto and served upon you herewith.

Dated this 6th day of July, 1940.

ROLLIN BROWNE,
JAMES D. OUCHTERLONEY,
GEORGE CRAVEN,
Attorneys for Petitioner,
20 Exchange Place,
New York, N. Y.

MITCHELL, TAYLOR, CAPRON & MARSH,
20 Exchange Place,
293 New York, N. Y.,
Of Counsel.

Personal service of the foregoing notice, together with a copy of the petition for review and assignment of errors mentioned therein, is hereby acknowledged this 6th day of July, 1940.

J. P. WENCHELL,
Chief Counsel,
Bureau of Internal Revenue,
Counsel for Respondent.

294

Petition for Review.

295

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

Board of Tax Appeals, Docket No. 97857.

ESTATE OF KATE READ BLACQUE, CITY BANK FARMERS TRUST COMPANY, as Executor of the Last Will and Testament of Kate Read Blacque, Deceased,

Petitioner,

—against—

296

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

To the Honorable Judges of the United States Circuit Court of Appeals for the Second Circuit:

The petition of City Bank Farmers Trust Company, as executor of the last will and testament of Kate Read Blacque, deceased, respectfully shows:

I.

297

City Bank Farmers Trust Company is a corporation duly organized under the banking laws of the State of New York and is engaged in said state in the business of a trust company, with its principal office and place of business at No. 22 William Street, New York, N. Y. The said Kate Read Blacque died on April 3, 1937, a citizen of the United States residing in the City, County and State of New York, leaving a last will and testament which was duly admitted to probate by the Surrogate's Court of New York County, New York, on April 27, 1937. On said

298 last mentioned date letters testamentary were duly issued by said court to said City Bank Farmers Trust Company, the executor named in said will, which since said date has been and is now the duly appointed, qualified and acting executor of said last will and testament and which, as such executor, is the petitioner herein.

The respondent is the duly appointed, qualified and acting Commissioner of Internal Revenue of the United States, appointed and holding office by virtue of the laws of the United States.

The Federal estate tax return of the estate of said decedent was duly filed by the petitioner on July 1, 1938,
299 with the United States Collector of Internal Revenue for the Second District of New York, Custom House, New York, N. Y. The court in which the review of this proceeding is sought is the Circuit Court of Appeals for the Second Circuit, the circuit in which is located the office of said Collector.

II.

The nature of the controversy is as follows:

The petitioner elected on said Federal estate tax return to have the value of the gross estate of said decedent
300 determined by valuing all the property included therein on the date of the decedent's death as of the date one year after death, or on the other applicable valuation dates in the case of property distributed, sold, exchanged or otherwise disposed of between the date of death and the date one year after death, pursuant to the provisions of Section 302 (j) of the Revenue Act of 1926, as added by Section 202 (a) of the Revenue Act of 1935. During the period of one year after the death of said decedent the petitioner received in cash (1) interest of $4,863.55 which accrued after the date of death on bonds owned by the

decedent at the time of her death and retained by the 301
petitioner until the expiration of said one-year period; (2) interest of $1,212.24 which accrued after the date of death on bonds owned by the decedent on the date of death but sold or redeemed within the one-year period, and which interest was received from the purchaser on sale or the obligor on redemption; and (3) dividends of $43,947.83 on stocks owned by the decedent at the date of death which were payable to stockholders of record as of a date subsequent to that date. In addition thereto, on the date one year after the decedent's death, interest of $578.08 had accrued but was not due on bonds owned by the decedent on the date of death, and dividends of 302
$3,262.75 had been declared on stocks owned by the decedent on the date of death but were payable subsequent to one year after the date of death to stockholders of record as of a date within the period of one year after the date of death. Those five items of interest and dividends, amounting to $53,864.45, were disclosed by the petitioner on said return for purposes of information but were not included in the gross estate for estate tax purposes.

The respondent on April 3, 1939, issued a notice of deficiency setting forth his final determination of the estate tax liability of said estate and therein determined that, in addition to the assets owned by the decedent on the date of her death, there should be included in said gross estate 303
the said items of income accruing or arising after the date of death, amounting to $53,864.45, and on the basis of such determination determined that there was a deficiency of $13,996.28 in the estate tax on said estate.

The petitioner on April 8, 1939, filed a petition with the United States Board of Tax Appeals appealing from such determination. On motion duly made by the petitioner and granted by the Board the proceeding so instituted was consolidated with a proceeding instituted by City Bank Farmers Trust Company, as executor of the last will and

304 testament of Cordelia Y. Abendroth, deceased, Board of Tax Appeals Docket No. 94755, and on September 29, 1939, said consolidated proceedings were submitted to the Board on the pleadings and a stipulation of facts. On May 17, 1940, the Board rendered its opinion in said proceedings in which it sustained the respondent's said determination, and on May 18, 1940, the Board entered its decision determining that there is a deficiency of $13,996.28 in the estate tax on said estate.

III.

305 The petitioner, as a basis for such review, makes the following assignment of errors committed by the United States Board of Tax Appeals:

1. The Board erred in holding that where the executor of a decedent's estate elects upon the estate tax return, pursuant to the provisions of Section 302 (j) of the Revenue Act of 1926, as added by Section 202 (a) of the Revenue Act of 1935, to have the gross estate valued as of the date one year after death or other optional valuation dates specified in said section, there must be included as part of the gross estate income consisting of interest and dividends accruing or arising after the date of death, and in
306 failing and refusing to hold that such items of income should be excluded from the gross estate.

2. The Board erred in holding that said items of interest and dividends amounting to $53,864.45, which accrued or arose wholly after the decedent's death, or any part thereof, was part of the property included in the decedent's gross estate on the date of her death and in failing and refusing to hold that such interest and dividends were not part of such property on the date of death.

3. The Board erred in holding that said items of interest and dividends amounting to $53,864.45, or any part thereof, was part of the decedent's gross estate for estate tax purposes, and in failing and refusing to hold that said items should be excluded from such gross estate. 307

4. The Board erred in determining that there is a deficiency of $13,996.28, or any other amount, in the estate tax on said estate, and in failing and refusing to hold that there is no deficiency in such tax.

WHEREFORE, the petitioner prays that the decision of the United States Board of Tax Appeals be reviewed by the United States Circuit Court of Appeals for the Second Circuit; that a transcript of the record be prepared in accordance with the law and rules of said Court and transmitted to the Clerk of said Court for filing, and that appropriate action be taken to the end that the errors complained of may be reviewed and corrected by said Court. 308

ROLLIN BROWNE,
JAMES D. OUCHTERLONEY,
GEORGE CRAVEN,
Attorneys for Petitioner,
20 Exchange Place,
New York, N. Y. 309

MITCHELL, TAYLOR, CAPRON & MARSH,
20 Exchange Place,
New York, N. Y.,
Of Counsel.

State of New York,
County of New York—ss.:

GEORGE CRAVEN, being duly sworn, deposes and says that he is one of the attorneys and counsel of record for the petitioner in the above-entitled case; that as such attorney and counsel he is duly authorized to verify the petition for review by the United States Circuit Court of Appeals for the Second Circuit of the decision of the United States Board of Tax Appeals in the proceeding described in the foregoing petition; that he has read the said petition and knows the contents thereof, and that the facts set forth therein are true to the best of his knowledge, information and belief.

GEORGE CRAVEN.

Subscribed and sworn to before me
this 2nd day of July, 1940.

BERTHA BUSSELL,
Notary Public,
Bronx County.
Bronx Co. Clk's No. 135, Reg. No. 108B42.
N. Y. Co. Clk's No. 450, Reg. No. 2B327.
Kings Co. Clk's No. 222, Reg. No. 2233.
Commission expires March 30, 1942.
(Notary Seal)

Notice of Filing of Petition for Review. 313

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

Board of Tax Appeals, Docket No. 97857.

ESTATE OF KATE READ BLACQUE, CITY BANK FARMERS TRUST COMPANY, as Executor of the Last Will and Testament of Kate Read Blacque, Deceased, 314

Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

To the Commissioner of Internal Revenue:

315 You are hereby notified that the petitioner, City Bank Farmers Trust Company, as executor of the last will and testament of Kate Read Blacque, deceased, did on the 5th day of July, 1940, file with the Clerk of the United States Board of Tax Appeals at Washington, D. C., a petition for review by the United States Circuit Court of Appeals for the Second Circuit of the decision of the Board of Tax Appeals heretofore entered in the above-entitled case. A copy of the petition for review, together with the assign-

316 ment of errors as filed, is attached hereto and served upon you herewith.

Dated this 6th day of July, 1940.

ROLLIN BROWNE,
JAMES D. OUCHTERLONEY,
GEORGE CRAVEN,
Attorneys for Petitioner,
20 Exchange Place,
New York, N. Y.

MITCHELL, TAYLOR, CAPRON & MARSH,
20 Exchange Place,
317 New York, N. Y.,
Of Counsel.

Personal service of the foregoing notice, together with a copy of the petition for review and assignment of errors mentioned therein, is hereby acknowledged this 6th day of July, 1940.

J. P. WENCHEL,
Chief Counsel,
Bureau of Internal Revenue,
Counsel for Respondent.

318

Stipulation of Counsel.

319

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

Board of Tax Appeals, Docket No. 94755.

ESTATE OF CORDELIA Y. ABENDROTH, CITY BANK FARMERS TRUST COMPANY, as Executor of the Last Will and Testament of Cordelia Y. Abendroth, Deceased,

Petitioner,

320

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Board of Tax Appeals, Docket No. 97857.

ESTATE OF KATE READ BLACQUE, CITY BANK FARMERS TRUST COMPANY, as Executor of the Last Will and Testament of Kate Read Blacque, Deceased,

Petitioner,

—against—

321

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

IT IS STIPULATED AND AGREED between the parties to the above-entitled cases, which were consolidated for hearing by order of the Board of Tax Appeals and in which petitions for review by the United States Circuit Court of Appeals for the Second Circuit were filed on July 5, 1940,

322 that because the issue is the same in both cases, said cases may be consolidated for preparation of the record to be filed with said Circuit Court of Appeals and for hearing by said Court, and that one consolidated record of the proceedings in both cases in the United States Board of Tax Appeals may be filed with said Court.

Dated: July 19, 1940.

GEORGE CRAVEN,
Counsel for Petitioners.

323

J. P. WENCHEL,
Chief Counsel for
Bureau of Internal Revenue,
Counsel for Respondents.

So ordered,

D. E. ROBERTS,
Clerk,

August 5, 1940.

A true copy,

D. E. ROBERTS,
324 Clerk.
(Seal)

Praecipe for Record.

IN THE 325

UNITED STATES CIRCUIT COURT OF APPEALS,

FOR THE SECOND CIRCUIT.

Board of Tax Appeals, Docket No. 94755.

ESTATE OF CORDELIA Y. ABENDROTH, CITY BANK FARMERS TRUST COMPANY, as Executor of the Last Will and Testament of Cordelia Y. Abendroth, Deceased,
Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE, 323
Respondent.

Board of Tax Appeals, Docket No. 97857.

ESTATE OF KATE READ BLACQUE, CITY BANK FARMERS TRUST COMPANY, as Executor of the Last Will and Testament of Kate Read Blacque, Deceased,
Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,
Respondent.

327

To the Clerk of the United States Board of Tax Appeals:

You are hereby requested to prepare, transmit and deliver to the Clerk of the United States Circuit Court of Appeals for the Second Circuit a consolidated transcript of the record in the above-entitled cases, which were consolidated for hearing by order of the Board entered August 19, 1939, said record to be prepared and transmitted by law and the rules of said Court in connection with the petitions for review by said Circuit Court of

328 Appeals heretofore filed therein by the petitioners, and you are requested to include therein copies, duly certified as correct, of the following entries and documents:

1. Docket entries of the proceedings in each case before the Board.
2. Pleadings in each case before the Board, as follows:
   (a) Petition, including annexed copy of deficiency notice;
   (b) Answer.
3. Motion of petitioners for consolidation of cases and
329 notation saying that motion was granted by the Board.
4. Stipulation of facts and exhibits annexed thereto.
5. Opinions of Board.
6. Decision of Board in each case.
7. Petition for review, together with proof of service of notice of filing petition for review and of service of a copy of petition for review, in each case.
8. Stipulation and order of Circuit Court of Appeals for Second Circuit entered thereon for consolidation
330 of cases.
9. This praecipe.

GEORGE CRAVEN,
Counsel for Petitioners.

Service is hereby acknowledged of the foregoing praecipe this 10th day of August, 1940. No counter-praecipe will be filed.

J. P. WENCHEL,
Chief Counsel for
Bureau of Internal Revenue,
Counsel for Respondent.

Certificate.

UNITED STATES BOARD OF TAX APPEALS,

WASHINGTON.

Docket No. 94755.

ESTATE OF CORDELIA Y. ABENDROTH, CITY BANK FARMERS TRUST COMPANY, as Executor of the Last Will and Testament of Cordelia Y. Abendroth, Deceased,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Docket No. 97857.

ESTATE OF KATE READ BLACQUE, CITY BANK FARMERS TRUST COMPANY, as Executor of the Last Will and Testament of Kate Read Blacque, Deceased,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

I, B. D. Gamble, Clerk of the U. S. Board of Tax Appeals, do hereby certify that the foregoing pages, 1 to 122, inclusive, contain and are a true copy of the transcript of record, papers, and proceedings on file and of record in my office as called for by the Praecipe in the appeals as above numbered and entitled.

In testimony whereof, I hereunto set my hand and affix the seal of the United States Board of Tax Appeals, at Washington, in the District of Columbia, this 15th day of August, 1940.

B. D. GAMBLE,
Clerk,
United States Board of Tax Appeals.

(Seal)

Opinion, Circuit Court of Appeals.

337

UNITED STATES CIRCUIT COURT OF APPEALS

FOR THE SECOND CIRCUIT.

Nos. 82 & 83—October Term, 1940.

(Argued October 8, 1940 Decided October 8, 1940.)

ESTATE OF CORDELIA Y. ABENDROTH, CITY BANK FARMERS TRUST CO., as Executor, etc.,

Petitioner,

v.

338

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ESTATE OF KATE READ BLACQUE, CITY BANK FARMERS TRUST CO., as Executor, etc.,

Petitioner,

v.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Appeals from the United States Board of Tax Appeals.

339

Before—L. HAND, SWAN and AUGUSTUS N. HAND,

Circuit Judges.

ROLLIN BROWNE, for the Petitioners.

HARRY MARSELLI, for the Respondent.

Orders affirmed in open court on authority of *Saks* v. *Higgins*, 111 Fed. (2d) 78.

Order for Mandate.

340 UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of October, one thousand nine hundred and forty.

Present—HON. LEARNED HAND,
HON. THOMAS W. SWAN,
HON. AUGUSTUS N. HAND,
Circuit Judges.

341

ESTATE OF CORDELIA Y. ABENDROTH, CITY BANK FARMERS TRUST CO., Executors,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Appeal from the United States Board of Tax Appeals.

342 This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue forthwith to the said Board in accordance with this decree.

D. E. ROBERTS,
Clerk.

(Back)

343

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

ESTATE OF CORDELIA Y. ABENDROTH, CITY BANK FARMERS TRUST CO., E. ecutors,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ORDER FOR MANDATE.

344

UNITED STATES CIRCUIT COURT
OF APPEALS

SECOND CIRCUIT

Filed Oct. 10, 1940

D. E. ROBERTS, Clerk.

345

Order for Mandate.

346 UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

At a Stated Term of the United States Circuit Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 10th day of October, one thousand nine hundred and forty.

Present—HON. LEARNED HAND,
HON. THOMAS W. SWAN,
HON. AUGUSTUS N. HAND,
Circuit Judges.

347

ESTATE OF KATE READ BLACQUE, CITY BANK FARMERS TRUST CO., Executors,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Appeal from the United States Board of Tax Appeals.

348 This cause came on to be heard on the transcript of record from the United States Board of Tax Appeals, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the order of said United States Board of Tax Appeals be and it hereby is affirmed.

It is further ordered that a Mandate issue forthwith to the said Board in accordance with this decree.

D. E. ROBERTS,
Clerk.

(Back)

349

UNITED STATES CIRCUIT COURT OF APPEALS,

SECOND CIRCUIT.

ESTATE OF KATE READ BLACQUE, CITY BANK FARMERS TRUST CO., Executors,

vs.

COMMISSIONER OF INTERNAL REVENUE.

ORDER FOR MANDATE. 350

UNITED STATES CIRCUIT COURT OF APPEALS

SECOND CIRCUIT

Filed Oct. 10, 1940

D. E. ROBERTS, Clerk.

351

Clerk's Certificate.

352

UNITED STATES OF AMERICA,

SOUTHERN DISTRICT OF NEW YORK.

I, D. E. ROBERTS, Clerk of the United States Circuit Court of Appeals for the Second Circuit, do hereby certify that the foregoing pages, numbered from 1 to 116, inclusive, contain a true and complete transcript of the record and proceedings had in said Court, in the case of

ESTATE OF CORDELIA Y. ABENDROTH, CITY BANK FARMERS TRUST CO., Executors,

Petitioners,

353

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ESTATE OF KATE READ BLACQUE, CITY BANK FARMERS TRUST CO., Executors,

Petitioners,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

354 as the same remain of record and on file in my office.

IN TESTIMONY WHEREOF, I have caused the seal of the said Court to be hereunto affixed, at the City of New York, in the Southern District of New York, in the Second Circuit, this tenth day of October, in the year of our Lord one thousand nine hundred and forty, and of the Independence of the said United States the one hundred and sixty-fifth.

D. E. ROBERTS,
Clerk.

(Seal)

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1940

No. 510

ORDER ALLOWING CERTIORARI—Filed November 18, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following No. 274.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

SUPREME COURT OF THE UNITED STATES, OCTOBER TERM, 1940

No. 511

ORDER ALLOWING CERTIORARI—Filed November 18, 1940

The petition herein for a writ of certiorari to the United States Circuit Court of Appeals for the Second Circuit is granted, and the case is assigned for argument immediately following Nos. 274 and 510.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

FILE COPY

Office - Supreme Court, U. S.
FILED
OCT 16 1940
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

October Term 1940

Nos. 510 511

ESTATE OF CORDELIA Y. ABENDROTH, CITY BANK FARMERS TRUST COMPANY, as Executor of the Last Will and Testament of Cordelia Y. Abendroth, deceased,

Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ESTATE OF KATE READ BLACQUE, CITY BANK FARMERS TRUST COMPANY, as Executor of the Last Will and Testament of Kate Read Blacque, deceased,

Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

ROLLIN BROWNE,
JAMES D. OUCHTERLONEY,
GEORGE CRAVEN,
Counsel for Petitioners.

MITCHELL, TAYLOR, CAPRON & MARSH,
Of Counsel.

THE COURT PRESS, N. Y. C.

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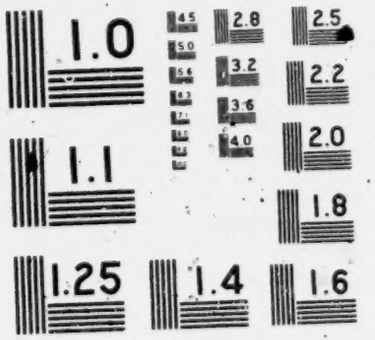

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IN THE

Supreme Court of the United States

October Term 1940

Nos.

ESTATE OF CORDELIA Y. ABENDROTH, CITY BANK FARMERS TRUST COMPANY, as Executor of the Last Will and Testament of Cordelia Y. Abendroth, deceased,

Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ESTATE OF KATE READ BLACQUE, CITY BANK FARMERS TRUST COMPANY, as Executor of the Last Will and Testament of Kate Read Blacque, deceased,

Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

Petition for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

The petitioners above named pray that writs of certiorari issue to review the judgments (R. 114, 116) of the United States Circuit Court of Appeals for the Second Circuit entered in these cases on October 10, 1940, affirming decisions of the Board of Tax Appeals. The cases were consolidated for trial in the Board and for hearing in the Court of Appeals (R. 28, 108).

Summary Statement of Matter Involved.

The only question involved in these cases is precisely the same question which is involved in the case of *Maass, as Sole Surviving Executor of the Last Will and Testament of Ida S. Saks, Deceased,* v. *Joseph T. Higgins, Collector,* which is now pending in this Court (No. 274) on a writ of certiorari granted October 14, 1940.

OPINIONS BELOW.

The majority opinion (R. 86) and the dissenting opinion (R. 87) of the United States Board of Tax Appeals are reported in 41 B. T. A. 1178. The *per curiam* opinion of the Circuit Court of Appeals (R. 113) is not officially reported.

JURISDICTION.

Jurisdiction to issue the writs prayed for is vested in this Court by Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. The judgments of the Circuit Court of Appeals were entered on October 10, 1940 (R. 114, 116).

QUESTION PRESENTED.

Where an executor elects to exercise the option provided in Section 302(j) of the Revenue Act of 1926, as added by Section 202 of the Revenue Act of 1935, to report the assets of the estate in the Federal estate tax return at their values one year after the decedent's death, must there be included in the gross estate, in addition to the property owned by the decedent at the date of death, the income accruing thereon between the date of death and such optional valuation date?

STATUTE INVOLVED.

There is involved Section 302(j) of the Revenue Act of 1926, as added by Section 202(a) of the Revenue Act of 1935, which, so far as material, reads as follows:

> "If the executor so elects upon his return * * * the value of the gross estate shall be determined by valuing all the property included therein on the date of the decedent's death as of the date one year after the decedent's death, except that (1) property included in the gross estate on the date of death and, within one year after the decedent's death, distributed by the executor * * * or sold, exchanged, or otherwise disposed of, shall be included at its value as of the time of such distribution, sale, exchange, or other disposition, whichever first occurs, instead of its value as of the date one year after the decedent's death, and (2) any interest or estate which is affected by mere lapse of time shall be included at its value as of the time of death (instead of the later date) with adjustment for any difference in its value as of the later date not due to mere lapse of time. * * *"

FACTS.

All the facts were stipulated and are set forth in two stipulations, one applicable to each estate (R. 29, 48).

After Mrs. Abendroth's death, her estate collected $1,793.26 of interest which accrued within one year after the date of her death on bonds owned by her at the date of her death, and $1,990.65 of ordinary dividends declared and payable on stock of corpora-

tions owned by her at the date of her death, out of earnings of the paying corporations, to stockholders of record as of various dates within one year after her death.

After Mrs. Blacque's death, her estate collected $6,653.87 of interest which accrued within one year after the date of her death on bonds owned by her at the date of her death, and $47,210.58 of ordinary dividends declared and payable on stock of corporations owned by her at the date of her death, out of earnings of the paying corporations, to stockholders of record as of various dates within one year after her death.

The items of interest and dividends received after the date of death in each case were not included in the gross estate as reported on the Federal estate tax return filed by the petitioner as executor. The respondent Commissioner of Internal Revenue, on audit of each return, held that such interest and dividends should be included in the gross estate in each case and, based on such holding, the respondent determined a deficiency in the Abendroth estate tax of $432.83 and a deficiency in the Blacque estate tax of $13,996.28.

RULINGS BELOW.

The Board of Tax Appeals, relying on the decision of the court below in *Maass* v. *Higgins, supra, (sub. nom. Saks* v. *Higgins,* 111 F. (2d) 78), approved the deficiencies determined by the Commissioner. Four members of the Board dissented (R. 87).

The court below affirmed, *per curiam,* on authority of its decision in *Maass* v. *Higgins, supra.*

Specification of Errors.

The Circuit Court of Appeals erred, in each case:

1. In holding that Section 302(j) of the Revenue Act of 1926, as amended, required the inclusion in the decedent's gross estate of the interest and dividends accruing after death upon bonds and stocks owned by the decedent at the date of death, and in failing and refusing to hold that such interest and dividends should be excluded from the gross estate.

2. In holding that said interest and dividends constituted a part of the property owned by the decedent at the date of death.

3. In upholding the validity of the regulations of the Treasury Department requiring the inclusion of such interest and dividends in the gross estate.

4. In affirming the decision of the Board of Tax Appeals.

Reasons for Granting the Writ.

On October 14, 1940, a writ of certiorari was issued by this Court to review the decision of the court below in *Maass* v. *Higgins, supra,* which involves the identical question presented in these cases. The allowance of certiorari in that case sufficiently demonstrates the importance of the question and the propriety, and indeed necessity, of a final decision thereon by this Court. Since the question will be presented to and decided by this Court in that case, the petitioners submit that they should be given an opportunity to be heard at the same time.

It is, therefore, respectfully requested that writs of certiorari issue to review the judgments of the Circuit Court of Appeals in these cases and that they be set down for argument immediately after *Maass* v. *Higgins, supra.*

Respectfully submitted,

ROLLIN BROWNE,
JAMES D. OUCHTERLONEY,
GEORGE CRAVEN,
Counsel for Petitioners.

MITCHELL, TAYLOR, CAPRON & MARSH,
Of Counsel.

October 14, 1940.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

Nos. 510-511.

ESTATE OF CORDELIA Y. ABENDROTH, CITY BANK FARMERS TRUST COMPANY, as Executor of the Last Will and Testament of Cordelia Y. Abendroth, deceased,

Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ESTATE OF KATE READ BLACQUE, CITY BANK FARMERS TRUST COMPANY, as Executor of the Last Will and Testament of Kate Read Blacque, deceased,

Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONERS.

ROLLIN BROWNE,
Attorney for Petitioners.

JAMES D. OUCHTERLONEY,
GEORGE CRAVEN,
MITCHELL, TAYLOR, CAPRON & MARSH,
Of Counsel.

THE COURT PRESS, N. Y. C.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1940.

Nos. 510-511.

ESTATE OF CORDELIA Y. ABENDROTH, CITY BANK FARMERS TRUST COMPANY, as Executor of the Last Will and Testament of Cordelia Y. Abendroth, deceased,

Petitioner,

—against—,

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

ESTATE OF KATE READ BLACQUE, CITY BANK FARMERS TRUST COMPANY, as Executor of the Last Will and Testament of Kate Read Blacque, deceased,

Petitioner,

—against—

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

BRIEF FOR PETITIONERS.

Opinions Below.

The majority opinion (R. 86) and the dissenting opinion (R. 87) of the Board of Tax Appeals are reported in 41 B. T. A. 1178. The *per curiam* opinion of the Circuit Court of Appeals (R. 113) is reported in 114 F. (2d) 1017.

Jurisdiction.

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code, as amended by the Act of February 13, 1925. The judgments of the Circuit Court of Appeals were entered October 10, 1940 (R. 114, 116). The petition for writs of certiorari was filed October 16, 1940, and granted November 18, 1940.

Question Presented.

Where an executor elects to exercise the option provided in Section 302(j) of the Revenue Act of 1926, as added by Section 202 of the Revenue Act of 1935, to report the assets of the estate in the Federal estate tax return at their values one year after the decedent's death, must there be included in the gross estate, in addition to the property owned by the decedent at the date of death, ordinary dividends and bond interest accruing between the date of death and such optional valuation date?

The Statute.

The statute involved is Title III of the Revenue Act of 1926, as amended, and more particularly the following sections:

> "Sec. 301. (a) In lieu of the tax imposed by Title III of the Revenue Act of 1924, a tax equal to the sum of the following percentages of the value of the net estate (determined as provided in section 303) is hereby imposed upon the transfer of the net estate of every decedent dying after the enactment of this act, whether a resi-

dent or nonresident of the United States; [then follow the tax rates].

"Sec. 302. The value of the gross estate of the decedent shall be determined by including the value at the time of his death of all property, real or personal, tangible or intangible, wherever situated * * *"

"(j) [as added by Sec. 202(a) of the Revenue Act of 1935] If the executor so elects upon his return (if filed within the time prescribed by law or prescribed by the Commissioner in pursuance of law), the value of the gross estate shall be determined by valuing all the property included therein on the date of the decedent's death as of the date one year after the decedent's death, except that (1) property included in the gross estate on the date of death and, within one year after the decedent's death, distributed by the executor (or, in the case of property included in the gross estate under subdivision (c), (d), or (f) of this section, distributed by the trustee under the instrument of transfer), or sold, exchanged or otherwise disposed of, shall be included at its value as of the time of such distribution, sale, exchange, or other disposition, whichever first occurs, instead of its value as of the date one year after the decedent's death, and (2) any interest or estate which is affected by mere lapse of time shall be included at its value as of the time of death (instead of the later date) with adjustment for any difference in its value as of the later date not due to mere lapse of time. No deduction under this title, of any item shall be allowed if allowance for such item is in effect given by the valuation under this subdivision. Wherever in any other subdivision or section of this title or in Title II of the Rev-

enue Act of 1932, reference is made to the value of property at the time of the decedent's death, such reference shall be deemed to refer to the value of such property used in determining the value of the gross estate. In case of an election made by the executor under this subdivision, then for the purposes of the deduction under section 303(a)(3) or section 303(b)(3), any bequest, legacy, devise, or transfer enumerated therein shall be valued as of the date of decedent's death with adjustment for any difference in value (not due to mere lapse of time or the occurrence or nonoccurrence of a contingency) of the property as of the date one year after the decedent's death (substituting the date of sale or exchange in the case of property sold or exchanged during such one-year period)."

The Regulation.

The regulation here in issue is Article 11 of Regulations 80 (1937 edition), the pertinent parts of which are set forth in an appendix, *infra*, pages 45-49.

The Facts.

All the facts were stipulated and are set forth in two stipulations, one applicable to each estate (R. 29, 48).

Cordelia Y. Abendroth died on October 9, 1936, and Kate Read Blacque died on April 3, 1937 (R. 29, 48). The executor in each case elected upon the return to have the gross estate valued as of one year after death, or, as to property disposed of during such one-year period, as of the date of such disposition, as permitted by Section 302(j) (R. 30, 49).

After Mrs. Abendroth's death, her estate collected $1,793.26 of interest which accrued within one year after the date of her death on bonds owned by her at the date of her death, and $1,990.65 of ordinary dividends declared and payable on corporate stocks owned by her at the date of her death, out of earnings of the paying corporations, to stockholders of record as of various dates within one year after her death (R. 32). Income of $3,783.91 was thus earned during the period of one year after death on the assets owned on the date of death.

After Mrs. Blacque's death, her estate collected $6,653.87 of interest which accrued within one year after the date of her death on bonds earned by her at the date of her death, and $47,210.58 of ordinary dividends declared and payable on corporate stocks owned by her at the date of her death, out of earnings of the paying corporations, to stockholders of record as of various dates within one year after her death (R. 51). Income of $53,864.45 was thus earned during the period of one year after death on the assets owned on the date of death.

The return in each case included in the gross estate all bond interest accrued to the date of death but payable thereafter, and all dividends which were declared and payable after death to stockholders of record as of a date prior to death (R. 31, 50). Those items of income accrued prior to death are not in dispute.

The executor in each case omitted from the gross estate the items of income accrued after death, but the Commissioner added such items to the gross estate (R. 32-33, 51-52).

For example, Mrs. Abendroth owned 45 shares of American Telephone and Telegraph Company, stock

At the time of her death this stock carried a right to a dividend theretofore declared which was payable after her death to stockholders of record prior to her death, in the amount of $101.25. The executor included that dividend in the estate tax return as a separate item (in addition to the value of the stock itself, "ex-dividend") and it is not in dispute. In addition to that dividend, the Commissioner has added to the gross estate three dividends of $101.25 each paid within one year after death to stockholders of record as of a date within such one year period, and one dividend of $101.25 paid more than one year after death to stockholders of record as of a date within one year after death. In this way, the Commissioner has increased the gross estate by the amount of four regular quarterly dividends received after the decedent's death, in addition to the one dividend which the executor included in the estate because it was payable to stockholders of record as of a date prior to death (R. 34).

Mrs. Abendroth also owned $2,000 principal amount of Central Pacific Railway 5% Bonds, on which interest of $19.17 had accrued to October 9, 1936, the date of death. The executor included this item of accrued interest in the estate tax return as a separate item (in addition to the value of the bond, exclusive of interest) and it is not in dispute. In addition to the interest accrued to the date of death, the Commissioner has added to the gross estate the semi-annual instalment of interest paid February 1, 1937 ($50), less the amount thereof which had accrued to the date of death, a net amount of $30.83; the full semi-annual instalment of interest paid August 1, 1937, in the amount of $50; and the interest accrued from August 1, 1937 through October 9,

1937 (one year after death) in the amount of $19.17. In this way, the Commissioner increased the gross estate by one full year's interest on such bonds (R. 36).

It is not entirely clear from Exhibit A annexed to each Stipulation of Facts that the Commissioner included in the gross estate one full year's bond interest in addition to the interest accrued to the date of death. However, paragraphs 7 and 8 of the Stipulation of Facts in each case show that that is what the Commissioner did (R. 31-32; 50-51).

The estate tax deficiencies here in dispute ($432.83 in the *Aboudroth* case and $13,996.28 in the *Blacque* case) were due entirely to the Commissioner's addition to the gross estate of the items of interest and dividends accrued after death as hereinabove set forth.

The Rulings Below.

The Board of Tax Appeals affirmed the Commissioner's determination on the authority of the decision of the court below in *Maass* v. *Higgins* (*sub nom. Saks* v. *Higgins*, 111 F. (2d) 78), now pending in this Court on writ of certiorari, No. 274, October Term, 1940. There was a dissenting opinion by four members of the Board.

The court below affirmed the Board, *per curiam*, on the authority of its decision in *Maass* v. *Higgins*.

Specification of Errors.

The Circuit Court of Appeals erred, in each case:

1. In holding that Section 302(j) of the Revenue Act of 1926, as amended, requires the inclusion in

the decedent's gross estate of the interest and dividends accruing after death upon bonds and stocks owned by the decedent at the date of death, and in failing and refusing to hold that such interest and dividends should be excluded from the gross estate.

2. In holding that said interest and dividends constituted a part of the property owned by the decedent at the date of death.

3. In upholding the validity of the regulations of the Treasury Department requiring the inclusion of such interest and dividends in the gross estate.

4. In affirming the decision of the Board of Tax Appeals.

Summary of Argument.

Irrespective of whether or not the optional valuation privilege is availed of, the same provisions of the estate tax law impose the tax on the decedent's estate which is transferred by reason of his death, and define such estate as comprising all property "to the extent of the interest of the decedent therein at the time of his death", with certain additions not here material, including property transferred by him in contemplation of or intended to take effect at or after his death.

In the usual case, such property is valued as of the date of death, and it is perfectly well settled that, in such case, income earned after death is not to be included therein.

If the option granted by Section 302(j) is exercised, the same property is to be valued as of one year after the decedent's death. No mention is made of income after death.

So far as the language of the statute is concerned, there is no more ground for treating the income after death as a part of the estate in one case than in the other.

The income after death was not in existence at the date of death and was not, in fact, a part of the decedent's estate at that time.

It follows necessarily from previous decisions of this Court that such income may not be treated as constituting, in theory, a part of the decedent's estate at the time of his death.

Unless the income after death actually depleted the assets in the estate at the date of death and therefore reduced their value, there is no reason for treating such income, contrary to fact, as if it were a part of the decedent's estate at the time of his death.

The interest and dividends received after death by the estates in these cases did not deplete the bonds and stocks on which they were earned, or reduce their value. The interest was the usual kind of bond interest and the dividends were ordinary dividends paid in the regular course of business. This Court has held that such interest and dividends are income and, for that very reason, may not be treated, to any extent, as a return of capital.

The statute is unambiguous, but if interpretation be required, the legislative history shows that Con-

gress intended that income after death should not be added to the estate if the optional valuation were used.

It is not necessary, as the Treasury contends, to include in the estate the income after death, in order to prevent tax evasion.

In any event, the Treasury's "interpretation" of the statute should be disapproved; it would treat ordinary dividends and interest as constituting, at one and the same time, both capital and income to the estate and thus would impose an unjust burden of double taxation which there is no reason to believe Congress would approve.

Argument.

The petitioners' case might well be rested on the dissenting opinion of Judge Chase in *Maass* v. *Higgins* and the opinion of Judge Chesnut (D. C. Md.) in *Clark* v. *United States*, 33 F. Supp. 216. Those opinions are so convincing and comprehensive that nothing in the way of argument need be added and, indeed, little can be added.

Necessarily, this brief will be found to contain many of the points which have been developed fully in those opinions. We shall, however, present certain additional considerations which we believe will further fortify the conclusion reached by Judge Chase and Judge Chesnut.

I.

The express language of the statute excludes from the estate any property, whether capital or income, not a part of the decedent's estate on the date of his death.

It clearly was within the power of Congress to require the estate tax to be computed on the basis of the capital assets owned at the date of death plus the income produced during the year after death, as the price of exercising the option of valuing the assets of the estate as of one year after death.

The question here is whether Congress has done so.

The first thing to be observed is that the statute contains no reference to income after death, but provides specifically that, irrespective of whether the assets of the estate be valued as of the date of death or as of one year later, the tax shall be computed on the property in the decedent's estate at the date of his death. Congress has said, as plainly as it could, that in either event the tax is laid on the same assets, with only a change in their valuation.

What property is to be considered as within the decedent's estate at the date of his death may, indeed must, be ascertained by an examination of the estate tax law in effect before the enactment of the optional valuation provision, and the rulings and decisions interpreting it.

Section 301 imposes the estate tax "upon the transfer of the net estate of every decedent". Section 303 defines the net estate as "the gross estate" less certain exemptions and deductions.

Section 302 provides that the value of the decedent

ent's gross estate shall be determined "by including the value at the time of his death of all property * * * (a) *to the extent of the interest therein of the decedent at the time of his death*" plus property transferred by the decedent during his life in certain specified ways, property over which he has exercised a general power of appointment and proceeds of insurance taken out by the decedent on his own life.

Although the estate tax return is not required to be filed until fifteen months (formerly one year) after death and although deductions are specifically allowed in computing the tax for all administration expenses during that period (Sec. 303(a)(1)), it always has been well settled that no account need be taken of any income earned by the estate during administration or at any time after the decedent's death.[1]

In the administration of the law no effort ever has been made to impose the tax on income earned after death, except in one case where it was obvious that the Treasury, being uncertain as to whether a particular item represented a part of the estate's capital at the date of death or income earned thereafter, taxed it as both. *Bull* v. *United States*, 295 U. S. 247. In that case, this Court determined that the item represented income earned after death and therefore was not subject to estate tax as a part of the decedent's estate.

In the administration of two special provisions of the law prior to the enactment of the optional valuation provision, the Treasury was called upon to deter-

[1] Income taxes on income after death and property taxes accruing after death are excluded from the allowable administrative expenses by Sec. 303(a)(1).

mine whether the problem of valuing as of a later date capital assets in existence on an earlier date required the inclusion of the income earned in the intervening period. In neither instance did the Treasury require the inclusion of such income.

Section 303(a)(2) of the estate tax law provides that, subject to certain limitations, a deduction shall be allowed for an amount equal to the value of "any property" acquired by the decedent from a person who died within five years prior to the decedent's death and in whose estate the property was subjected to estate tax. The deduction is limited to the value on the date of the first decedent's death or the value on the date of the second decedent's death, whichever is lower. The regulations (Art. 41, Reg. 80) do not provide that, where the property in the first decedent's estate is valued as of the date of the second decedent's death, the income in the intervening period shall be included, and, so far as we have been able to ascertain, no contention that it should be included ever has been advanced by anyone.

Section 302(c) provides for the inclusion in the decedent's gross estate of the value, as of the date of his death, of the decedent's interest in any property which he transferred during his life in contemplation of death or to take effect at or after his death. Here again, in valuing as of the date of the decedent's death property transferred by the decedent before his death, the Treasury never has attempted to include the income of the intervening period.

The question whether the income after death forms a part of the estate which was transferred by reason of death is involved also in other general provisions

of the estate tax law. Section 315(a) provides that the estate tax "shall be a lien for ten years upon the gross estate of the decedent". The Surrogate's Court of Westchester County, New York, has held that this lien "attaches only to the corpus and not to the income produced after death". The Surrogate said that "by no stretch of the imagination can it be said that the lien attaches to anything more than the estate existing at the date of death", and added, *ad passim*, that "Inasmuch as estate taxes are levied as of the date of death, income thereafter produced may not be considered in computing the taxable estate." *Matter of Andrus*, 169 Misc. (N. Y.) 740.

Section 315(b) provides that the lien for the tax shall attach also to any property transferred by the decedent during his life in such a way as to be subject to estate tax, "to the extent of the decedent's interest therein at the time of such transfer". So far as we have been able to ascertain, it never has been contended that the lien of the tax attaches to the income which was received, and probably spent, by the transferee after the transfer.

The particular provision here in question, Section 302(j), was enacted as an integral part of the statutory scheme just described. It provides that, at the option of the executor "the value of *the gross estate* shall be determined by valuing all the property *included therein on the date of the decedent's death*" at its value one year after death, or as to property disposed of during the one year period, at its value on the date of such disposition.

Section 301, which imposes the tax upon the transfer of the decedent's estate, remains applicable as in the ordinary case, as do the other provisions of Sec-

tion 302, which prescribe what property shall be included in the gross estate.

The "*gross estate*" which is to be valued as of one year after death is the same "*gross estate*" which was in existence and capable of ascertainment and valuation on the date of the decedent's death. It is *the decedent's* estate. It consists of the property *owned by the decedent at his death;* with certain additions not here material, which passes by reason of his death. No part of that property may be omitted from the optional valuation, even if it since has been sold, distributed, consumed or otherwise disposed of, and nothing else need be added.

It is conceded that if an asset of the decedent has been exchanged for another asset, it is the value of the original asset which must be included (as of the date of the exchange) and not the value of the new asset as of one year after death, no matter how much more or how much less it then may be worth. If a bond, worth $1,000 at death, is exchanged six months later, when it is worth $500, for another bond of equal value, the original bond is included in the estate at the value of $500 and the new bond is ignored, irrespective of what its value may be one year after death.

Only changes in value of the property existing at the date of death are to be taken into account. Changes in the property itself are to be ignored. All the assets of "the gross estate", "all the property included therein on the date of the decedent's death" must be valued as of one year after death or, if disposed of sooner, as of the date of disposition.

As to property which is wholly or partially destroyed by fire or other casualty during the one-year

period, the resulting loss (adjusted for any insurance received) is taken into account whether or not the optional valuation method is used. Section 303(a)(1) allows the deduction from the gross estate of any loss during the period of administration caused by fire, storm, shipwreck or other casualty, or by theft, to the extent not compensated for by insurance, provided the estate does not claim an income tax deduction for such loss.[2]

These results flow from the express direction of the statute to determine the *gross estate of the decedent* by valuing "*all the property included therein on the date of the decedent's death*" as of one year after death or, as to property theretofore disposed of, as of the date of disposition.

If Congress intended to make an exception to this general statutory scheme, so as to require the addition to the decedent's gross estate at the time of his death of the income earned by the estate during the one year after his death, which income did not exist at the date of his death and might never come into existence, it would have been a simple matter to say so in language which could not be misunderstood. The fact that Congress did not say so should be sufficient proof that it had no such intention (*United States* v. *Field*, 255 U. S. 257, 264), especially since, as we shall show, such a requirement would run counter to established principles long embedded in the estate tax law.

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[2] In order to make certain that a double estate tax benefit for such a loss shall not be allowed in case the optional valuation method is used, Sec. 302(j) provides that "no deduction under this title of any item shall be allowed if allowance for such item is in effect given by the valuation under this subdivision".

We show below that in enacting the optional valuation provision Congress in fact did not intend to subject the income after death to the estate tax. But, even if Congress had had such an intention, it could not be given effect, because nowhere in the statute is there any "language which can be reasonably construed to effect it". *Smietanka* v. *First Trust and Savings Bank*, 257 U. S. 602, 606.

The income after death is subject to income tax against the estate. To subject it also to estate tax would result in a duplication of taxes which, as this Court has said, "even in an exigent war tax measure is to be avoided unless required by express words". *United States* v. *Supplee-Biddle Hardware Co.*, 265 U. S. 189, 196. In a large estate the two taxes in the aggregate would exceed the income itself.

If there were any doubt as to the meaning of the provision, such doubt should be resolved against the claimed tax (*Shwab* v. *Doyle*, 258 U. S. 529, 536).

The provision was intended to afford relief from taxation and therefore should be liberally construed and applied. *Helvering* v. *Bliss*, 293 U. S. 144, 150-151.

II.

Income earned after death is not, in fact, part of the decedent's estate at the time of his death.

The Treasury concedes that the statute imposes the alternative optional tax only on the property in the estate at the date of death. It does not assert that the income earned after death was in existence at the date of death. But the Treasury seeks to solve the dilemma in which it finds itself by advancing the theory that every capital asset owned at the date of

death included the "right" to all future income to be derived therefrom, and that the subsequent receipt of the income thus represents a partial realization of the capital asset.

It is said that a bond comprises a "right" to repayment of the principal amount and a "right" to receive interest at the fixed rate until maturity. It is said that corporate stock includes a "right" to receive future dividends, when, as and if declared, out of the existing surplus of the corporation and any earnings that may be made in the future; and that real property includes a "right" to receive rent for its future use.

The highly intricate and artificial theory thus advanced by the Treasury finds no support in fact or in law.

On the date of the decedent's death, there was no existing property right in the so-called future income from his capital. That is so because such "future income" was not then in existence, but was only "an expectancy of income, or income, more accurately, in the process of becoming." *United States* v. *Safety Car Heating Company*, 297 U. S. 88, 99.

In the case of an interest-bearing bond, the decedent did have a contract right to receive interest when and as it should accrue, but that right ripened into an existing property right only when and as interest actually accrued through lapse of time.

As to rent accruing after death on an existing lease on real property, it is well established that rent grows out of the land and is paid for the right of occupancy; rent is not apportionable but accrues on the dates fixed for its payment. Until rent day, there is no existing obligation to pay or right to receive rent.

In re Roth and Appel, 181 Fed. 667, C. C. A. (2); *Manhattan Properties, Inc.* v. *Irving Trust Company*, 291 U. S. 320.

As to real property vacant at the date of death, there is at that time not even a conditional or inchoate right to any "future rent".

As to any dividends not already declared on corporate stock, the decedent had only a hope.

The Treasury Regulation is nothing but a thinly disguised assertion that the income arising after death is itself a part of the property owned at death. The assertion not only is contrary to fact but also ignores the fundamental distinction between capital and income.

In *Eisner* v. *Macomber*, 252 U. S. 189, this Court said, at page 206:

> "The fundamental relation of 'capital' to 'income' has been much discussed by economists, the former being likened to the tree or the land, the latter to the fruit or the crop; the former depicted as a reservoir supplied from springs, the latter as the outlet stream to be measured by its flow during a period of time."

In the same case, this Court said (p. 207) that income from property is

> "not a *growth* or *increment* of value *in* the investment; but a gain, a profit, something of exchangeable value *proceeding from* the property, *severed from* the capital however invested or employed, and *coming in*, being '*derived*', that is, *received* or *drawn by* the recipient (the taxpayer) for his *separate* use, benefit and disposal." (Italics the Court's.)

Since income from property is something "derived from capital" "proceeding from the property" and "severed from the capital", it cannot be said that such income is merely a part of the capital or property itself.

If on the date of his death the decedent owned land on which no crops were planted and one year after his death the land was in exactly the same condition, but in the meantime a crop had been planted and had matured and been harvested, it would be impossible to say that the crop was a part of the land at the time of the decedent's death.

If the decedent left vacant real property and, during the one year period after his death the executor leased such property and received rent therefrom, it simply would be contrary to fact to say that the rent was a part of the property owned by the decedent at the time of his death. The situation would be no different even if the property had been leased by the decedent prior to his death; the rent paid for the use of the property after the decedent's death would not represent an interest in the property at the time of his death.

Interest accrued to the date of death is subject to income tax imposed on the decedent with respect to his income up to the date of his death, but it is capital *to his estate* and, when subsequently received by the estate, is not income of the estate and is not subject to income tax. *Nichols* v. *United States*, 64 Ct. of Cls. 241, cer. den. 277 U. S. 584. Similarly as to dividends and other income.

This Court has held squarely in two cases that income earned by a decedent's estate after his death is not a part of his estate which was transferred to his heirs by reason of his death.

In *Bull* v. *United States, supra,* the estate of a deceased member of a partnership was entitled for a period of one year after his death "to receive the same interests, or participate in the losses to the same extent" as the deceased partner would, if living. The question was whether the amount received by the estate as its share of the partnership income during the one-year period was subject to estate tax or to income tax, or to both. This Court held that the amount so received by the estate was subject to income tax as income but was not subject to estate tax. The Court said, in effect, that the right of the deceased partner to participate in the firm earnings after his death was not a capital asset of his and therefore it did not become a capital asset of his estate upon his death, and thus was not subject to estate tax; but that, not being a part of the estate's original capital, it was income to the estate and therefore subject to income tax.

The question also came before this Court in *Irwin* v. *Gavit,* 268 U. S. 161. The income tax law provides that property acquired by bequest, devise or inheritance shall not be considered income, but that the income from such property shall be so considered. In *Irwin* v. *Gavit,* the income beneficiary of a testamentary trust sought to avoid income tax liability on the trust income distributed to him, asserting that such income was exempt under that provision. This Court overruled the contention, holding that the exempt bequest was the life interest in the estate, a capital asset which passed to the taxpayer from the decedent, and that the income arising therefrom after the decedent's death was not a part of such bequest but was a gain derived therefrom and therefore subject to income tax.

In *Koshland* v. *Helvering*, 298 U. S. 441, this Court held that income earned by a capital asset after any given date is not a part of the capital asset as of such date. Specifically, it was held in that case that a stock dividend which could have been taxed to the stockholder as income did not represent a portion of the stock originally acquired by him and, therefore, the Treasury had no right to require him to deduct the amount of such dividend from the cost of the original stock in order to determine his gain or loss upon a subsequent sale thereof. The Court said that "the Secretary of the Treasury is without power by regulatory amendment to add a provision that income derived from the capital asset shall be used to reduce cost". Of course, if the income did in fact represent a partial realization of the capital asset, as the Government contends in this case, it would be proper, even necessary, to reduce the original cost of the asset by the amount of such income.

Approval of the same general proposition is implicit in this Court's decision in *United States* v. *Safety Car Heating Company, supra.* It was held there that an amount received after March 1, 1913, on a claim for patent infringement which arose prior to that date did not constitute, in whole or in part, merely a partial realization of a capital asset owned on March 1, 1913, but was taxable in its entirety as income.

It is entirely clear that that which constitutes a part of a decedent's estate at the date of his death is subject to estate tax as having been transferred by reason of the decedent's death and is capital to those who receive it by bequest, devise or inheritance, and, therefore, is not taxable to them as income. *Cf. Lyeth*

v. *Hoey*, 305 U. S. 188. It is equally clear that the income earned by the estate after death is not a part of the estate, is not transferred by reason of the decedent's death and, therefore, is not subject to estate tax, but is a gain derived from the estate and taxable as income to those who receive it.

III.

Receipts after death may not be treated as if they were part of the decedent's estate, except to the extent that they deplete the original capital of the estate.

The very theory on which the Commissioner seeks to justify his Regulations—that the income represents a partial realization of the capital of the estate—demonstrates his error. If any income received by the executor during the one-year period constituted a partial disposition or realization of any asset held in the estate at the date of the decedent's death, the only procedure authorized by the statute, or even by the theory of the Regulation, would be to ascertain the portion of or interest in the asset so realized and include the same in the estate at its value at the time disposed of.

Any asset owned at the date of death which is "distributed by the executors * * * or sold, exchanged, or otherwise disposed of, shall be included at its value as of the time of such distribution, sale, exchange, or other disposition * * *, instead of its value as of the date one year after the decedent's death." In other words, if an asset owned at the date of death or any portion thereof or interest therein is disposed of within the one-year period, the proceeds received on

such disposition are not included in the valuation of the estate, but the asset or the portion thereof or interest therein thus disposed of is included at its value at the time of such disposition.

We have no desire to be technical. We concede that, as a practical matter, any amount derived from one of the original estate assets within the one-year period, which actually depletes that asset and in effect constitutes a partial realization or disposition thereof, might properly, to that extent, be included in the gross estate, in lieu of the portion of or interest in the original asset so realized or disposed of.

But the inclusion of any amount in the gross estate on any such theory would require a determination by the Commissioner that its receipt did actually exhaust or deplete the original capital asset to an ascertained extent.

In these cases the Commissioner has made no such determination. He merely has taken the position that any income earned by the estate after death must, as a matter of law, be considered to have exhausted or depleted the asset by which it was earned to the extent of its full amount and, therefore, must be taken into account in full.

The Commissioner's theory is patently erroneous. There are many kinds of income which might be earned by executors after the decedent's death which no one could with reason even claim to have any effect whatever on the original asset, by way of depletion or exhaustion.

For example, in the case of a patent or copyright, the executor may or may not put it to use during the one year after the decedent's death. If the executor

uses the patent or copyright, he may derive income from it, but it is perfectly clear that the fact that he has done so can have no effect whatever on its life or on its value except possibly to increase it. Whether or not the patent or copyright is used, it has a remaining life of one year less at the optional valuation date than it had at the date of the decedent's death and that diminution in its life may adversely affect its value, but such decrease in value would be caused "by mere lapse of time," and the statute expressly provides that changes in value due to "mere lapse of time" shall be disregarded.

Another example is a monopoly or franchise. It certainly cannot be contended seriously that the production of income from a franchise depletes or exhausts it or represents a partial realization or disposition of it. Here, again, if the franchise is for a limited period, there may be some decrease in value due to mere lapse of time. But no diminution in life or decrease in value can result from the production of income.

As a further example, take the case of a leasehold estate owned by the decedent at the time of his death. His executors may allow the property to remain unoccupied, or they may sublease it and thus derive income from it, but if they do that certainly will not shorten the leasehold or decrease its value in any way.

In the case of a franchise or other monopoly or lease which runs in perpetuity and not for a limited period of time, it is even more obvious that the productive use of such an asset during the year after death does not deplete or exhaust it or have any effect whatever on its value, except possibly to increase it.

The Treasury's theory is equally untenable with respect to income of any kind. It is inherent in the very concept of income from capital that it is a *gain* or *profit* derived from, and either severed or severable from, the capital, which leaves the capital undepleted and unimpaired.

Certain receipts, which in common practice often are treated as income, do to some extent deplete or impair the property from which they are produced. But, to the extent that they do so, they do not constitute true income but represent in part a return of capital and are not taxable as income.

For example, the owner of a mine is permitted to deduct from his gross receipts an appropriate amount to offset depletion; dividends paid out of a depletion reserve by a mining corporation are not considered taxable income. True stock dividends, representing merely a further division of the shares on which they are paid, and liquidating and other distributions out of corporate capital are not taxable income. The proceeds of the sale of an interest in property constitute income only to the extent they exceed an allocable portion of the cost of the entire asset.

As we shall show, the interest and dividends earned by the estates in the instant cases during the year after the decedent's death did not deplete or reduce the value of the bonds and stocks on which they were earned.

IV.

The interest and dividends earned after death, which the Commissioner has added to the estates herein, did not deplete the securities held in the estates or reduce the value thereof.

If interest received on a bond or a dividend received on stock represented a partial realization of the bond or stock itself, as contended by the Government, it readily can be seen that such interest or dividend would not constitute income in its entirety but that a portion thereof would represent a return of capital and only the excess would be subject to income tax.

The very fact that interest and ordinary dividends are taxable as income in their entirety is sufficient to demonstrate that they do not to any extent constitute a partial return of capital.

The Court of Appeals apparently recognized the impossibility of treating the same receipts as constituting at the same time both income and a return of capital. It solved the dilemma in *Maass* v. *Higgins* (No. 274), so far as it related to interest, by holding, in effect, that bond interest is not income in its entirety, and that although a portion of it is a realization of an increment in value of the capital investment, even that part is not ordinary income.

The court said that the value of a bond is the aggregate present value of all the obligor's promises to make payments in the future, including the promises to pay interest as well as the promise to pay principal, the value of each promise being discounted for the interval before its performance is due.

The court then said that although to the bondholder the interest payments "may appear to be the produce of his principal, it is not so", but that he gets, by way of principal and interest, more than he loaned "merely because a future dollar payable by another is less desirable than a present dollar in hand". The conclusion, of course, necessarily was that each payment, whether of so-called principal or of so-called interest, is merely a partial return of the original loan, increased in value because of the passage of time.

By this process of reasoning, the Court of Appeals (Judge Chase dissenting) held that the interest accrued and paid after death was but the realization of a part of the principal of the bond owned at death.

This Court has said that "the plain, obvious and rational meaning of a statute is always to be preferred to any curious, narrow, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover". *Lynch* v. *Alworth-Stephens Company*, 267 U. S. 364, 370.

Nevertheless, if a quarter of a century ago it had occurred to any lawyer to advance the theory announced by the Court of Appeals, no one can say with certainty whether or not it would have been accepted by this Court. It can be said, however, with perfect assurance, that if such theory had been accepted by this Court, we should have had a far different income tax law from the one we have had, or have thought we have had.

Untold millions of bond interest on which income tax has been paid would have been free of income tax because it would have constituted a partial re-

turn of capital. Further millions received on the maturity of bonds, which have gone free of tax as a return of capital, would have been taxable as income. Moreover, the income resulting from the final payment of principal, and possibly even the income resulting from each payment of interest, would have been taxable at special rates as capital gain, rather than at full surtax rates as ordinary income (Int. Rev. Code, Sec. 117(f)).

The bench, the bar, the Treasury and the man in the street have assumed for a great many years that bond interest is ordinary income. Never before has it occurred to anyone to contend that it represents only a partial repayment of the principal of the bond, at an increased value.

The contention has been made, however, that if a bond is issued at a premium each payment of interest really represents, in part, not interest but a partial return to the purchaser *of the premium*. The contention was overruled by this Court, which said that "in the ordinary affairs of life no one stops for refined analysis of the nature of a premium or considers that the periodic payment universally called 'interest' is in part something wholly distinguished—that is, a return of borrowed capital". *Old Colony Railroad Co.* v. *Commissioner*, 284 U. S. 552.

If, as held by this Court in the *Old Colony Railroad* case, the receipt of interest does not deplete the premium at which a bond was issued, *a fortiori* it does not deplete the principal amount of the bond.

We submit it is far too late to recognize the revolutionary metamorphosis of the concept of bond interest attempted by the Treasury and the Court of Appeals by means of a new "interpretation" of gen-

eral language which has been on the statute books since 1916.

If the old rule, that bond interest is ordinary income and not to any extent a return of the original loan, be adhered to, it is clear that the receipt of interest when and as it accrues does not deplete or reduce the value of the principal obligation.

As to dividends, the majority of the Court of Appeals recognized some difficulty in applying to them the new theory which it had evolved as to bond interest. However, the court felt that Congress intended to treat all income during the year after death on the same basis and concluded that, since interest must be included in the gross estate, dividends must also be included, as well as rent from real estate.

The Court of Appeals overlooked the fact that this Court held, many years ago, that ordinary dividends paid in the usual course of business constituted, not a part of the stock itself, and not merely a realization of an increment in value of the stock, but ordinary income which neither depleted nor reduced the value of the stock and therefore were taxable as income in their entirety. *Lynch* v. *Hornby*, 247 U. S. 339. In that case it appeared that the dividends were paid out of earnings or profits accumulated by the corporation prior to 1913, but, nevertheless, it was held that since they were ordinary dividends paid in the usual course of business, they were income. The Court said, page 346:

> "We do not overlook the fact that every dividend distribution diminishes by just so much the assets of the corporation, and in a theoretical sense reduces the intrinsic value of the stock. But, at the same time, it demonstrates the

> capacity of the corporation to pay dividends, holds out a promise of further dividends in the future, and quite probably increases the market value of the shares. In our opinion Congress laid hold of dividends paid in the ordinary course as *de facto* income of the stockholders, without regard to the ultimate effect upon the corporation resulting from their payment."

This Court later pointed out that its decision in the *Hornby* case applied only to ordinary dividends paid in the usual course of business, and distinguished liquidating dividends and certain extraordinary dividends paid under special circumstances, which, because they depleted the stock to an equivalent extent, were considered merely a return of capital and not income. See *Southern Pacific Company* v. *Lowe*, 247 U. S. 330; *Lynch* v. *Turrish*, 247 U. S. 221; *Gulf Oil Corporation* v. *Lewellyn*, 248 U. S. 71.

It has been stipulated that all the dividends in the instant cases "were ordinary dividends and were not extraordinary or liquidating dividends, and were declared and paid or payable out of current earnings of the paying corporations or out of accumulated earnings of the paying corporations for years prior to the date of death" (R. 32, 51).

Exhibit A to the stipulation in the *Abendroth* case shows that, of the total dividends involved in that case, $623.25 consisted of fixed dividends on preferred stocks (R. 32-48).

Exhibit A to the stipulation in the *Blacque* case shows that, of the total amount of dividends involved in that case, $25,646.25 consisted of fixed dividends on preferred stocks (R. 62-83).

The stock dividends on which this Court ruled in the *Koshland* case consisted of a distribution of common shares on preferred shares. This Court held that such dividends were income which constitutionally might have been taxed by Congress and, therefore, although Congress had exempted all stock dividends from tax under the mistaken theory that they necessarily represented merely a return of capital, they "were income and may not be treated as a return of capital". A Treasury regulation which required that the stockholder's cost of his original stock should be reduced by the amount of such dividend was held to be unauthorized and invalid.

If dividends on preferred stock, payable in common stock, "may not be treated as returns of capital", *a fortiori* such dividends paid in cash may not be so treated.

The fact that the dividends received on the common stocks held by the two estates in these cases were ordinary dividends paid in the usual course of business appears not only from the express stipulation to that effect but also from the exhibits annexed to the stipulations.

The *Abendroth* estate held common or capital stock of *American Telephone and Telegraph Company*, on which the dividends which accrued during the year after death amounted to $9 per share, paid in four equal quarterly payments. It owned common class B stock of *American Tobacco Company*, on which the dividends amounted to $10 per share, in equal quarterly payments; 100 shares of *North American Company* common stock, on which one dividend of 50¢ per share and three dividends of 30¢ per share were paid; 50 shares of *Union Pacific Railroad* common stock,

on which four quarterly dividends of $1.50 per share were paid; 48 shares of common or capital stock of *Standard Oil Company of Indiana*, on which two quarterly dividends of 40¢ per share, one of 50¢ per share and one of $1.25 per share were paid (R. 34-35, 46).

The common stocks owned by the *Blacque* estate on which dividends were received during the year after death were: *American Can Company* which paid one dividend of $1 per share; *American Telephone and Telegraph Company*; *American Tobacco Company* class B; *Atlantic Refining Company*, which paid one dividend of 25¢; *Bigelow Sanford Carpet Company*, which paid only one dividend of 75¢; *Chesebrough Manufacturing Company*, which paid one dividend of $1.50; *Chrysler Corporation*, which paid one dividend of $2, one of $3 and one of $3.50; *Consolidated Edison Company*, which paid four quarterly dividends of 50¢; *Consolidated Oil Company*, which paid one dividend of 20¢; *Corn Products Refining Company*, which paid one dividend of 75¢; *Eastman Kodak Company*, which paid one dividend of $2; *General Cigar Company*, which paid one dividend of $1; *General Electric Company*, which paid one dividend of 30¢, two of 40¢ and one of $1; *General Foods Corporation*, which paid one dividend of 50¢; *General Motors Corporation*, which paid two dividends of $1; *International Business Machines Company*, which paid four quarterly dividends of $1.50; *International Nickel Company*, which paid three quarterly dividends of 50¢ and one of 75¢; *Lanston Monotype Machine Company*, which paid four quarterly dividends of $1; *Liggett & Myers Tobacco Company*, Class B, which paid four quarterly dividends of $1 and one extra dividend

of $2; *Monsanto Chemical Company*, which paid one dividend of 50¢; *National Biscuit Company*, which paid one dividend of 40¢; *Ohio Oil Company*, which paid one dividend of 50¢; *Pennsylvania Railroad*, which paid one dividend of 50¢ and one of 75¢; *Pullman, Inc.*, which paid one dividend of 37½¢; *Socony Vacuum Oil Company*, which paid two dividends of 25¢ and one of 30¢; *Standard Oil Company of California*, which paid one dividend of 35¢, two of 45¢ and one of 80¢; *Standard Oil Company of Indiana*, which paid one dividend of 25¢, one of 40¢, one of 50¢ and one of $1; *Standard Oil Company of Kentucky*, which paid one dividend of 40¢; *Standard Oil Company of New Jersey*, which paid two dividends of $1.25; *Texas Gulf Sulphur Company*, which paid one dividend of 75¢; *Union Carbide & Carbon Corporation*, which paid four dividends of 80¢; *Union Pacific Railroad*, which paid four dividends of $1.50; *United Fruit Company*, which paid one dividend of 75¢; and *Westinghouse Electric and Manufacturing Company*, which paid one dividend of $1 (R. 62-83).

In each instance the dividends earned on the stock during the year after death represented only a moderate rate of return on the value of the stock as included in the gross estate.

This Court held in *Helvering* v. *Gowran*, 302 U. S. 238, that a dividend paid in preferred shares on common stock, which might have been treated as income under the Constitution, was income and not a return of capital, despite the fact that Congress had not taxed it as income. It was held that the stockholder could not allocate a part of the cost of his original common stock to the preferred stock received as a dividend, but that when he later sold

such preferred stock the entire proceeds of the sale were taxable as income. It was held further that the dividend shares were separate and distinct from the original shares, not even in theory a part of them, and therefore could not be deemed to have been "held" by the taxpayer prior to the payment of the dividend for the purpose of determining the "holding period" for "capital gain" purposes. The Court said, page 244:

> "Whether taxed by Congress or not, it was income, substantially equivalent for income tax purposes to cash or property, and under §115(b) was presumed to have been made 'out of earnings or profits to the extent thereof, and from the most recently accumulated earnings or profits'. In no sense, therefore, can it be said to have been 'held' by Gowran prior to its declaration."

The Court held invalid certain regulations which proceeded on the theory that any stock dividend which Congress had not seen fit to tax as income constituted merely a part of the original stock on which it was paid. Of such regulation, the Court said, in a footnote on page 244 of its opinion:

> "But this was based upon the erroneous premise that stock dividends could not be income, and was part of an administrative scheme to apportion some of the cost of the original shares to the stock received by way of dividend. This arrangement we declared in *Koshland* v. *Helvering*, 298 U. S. 441, to be without statutory authority, and the same must be said of the Regulation involved here."

The dividend in the *Gowran* case was a dividend of $14 per share on common stock, payable in preferred

stock. It appeared that it was paid out of surplus earnings and that, apparently, was sufficient for this Court to hold that it was income to the stockholder. If a dividend such as that constitutes income and may not be treated as a return of capital or be deemed to have been "held" prior to its receipt, *a fortiori*, the dividends paid on the common stocks held by the estates in these cases must be viewed in the same light.

V.

The statute, being clear and unambiguous, requires no interpretation by Treasury regulation.

The Regulation can be sustained only if the statute is ambiguous and therefore requires interpretation. In *Koshland* v. *Helvering*, *supra*, this Court said, pages 446-447:

> "Where the act uses ambiguous terms, or is of doubtful construction, a clarifying regulation or one indicating the method of its application to specific cases not only is permissible but is to be given great weight by the courts. And the same principle governs where the statute merely expresses a general rule and invests the Secretary of the Treasury with authority to promulgate regulations appropriate to its enforcement. But where, as in this case, the provisions of the act are unambiguous, and its directions specific, there is no power to amend it by regulation."

As stated, this Court held in that case that stock dividends taxable as income (though not actually so taxed) are not a partial return of the original stock

investment, and that the Secretary of the Treasury had no power to treat them as such by regulation. See, also, *Helvering* v. *Gowran, supra.* Certainly, if stock dividends cannot be so treated, bond interest and ordinary cash dividends cannot.

The Treasury's feeling that the statute as enacted is unwise or contains some defect or omission, even if well founded, would not justify a correction of it by "interpretation".

There is, in fact, no defect or omission in the statute which needs correction. As has been shown, it would be a most unusual provision and would upset many fundamental principles of the law of taxation if the statute had provided for the inclusion in the decedent's estate of the income after death.

Of course, if the income after death had been required to be added to the estate, the relief which Congress admittedly desired to extend to estates would have been diminished, but there is no indication that Congress felt it was being too generous. On the contrary, as we shall show, there is positive proof in the legislative history of the provision that Congress intended to exclude the income after death.

VI.

The legislative history shows that Congress did not intend to subject income after death to the estate tax.

If, as the Treasury contends, the statute is ambiguous and requires interpretation, we are entitled to look to the legislative history for guidance.

Section 202 of the Revenue Bill of 1935, as sent to conference by the Senate and House, provided for amending Section 303(a) of the Revenue Act of 1926, allowing certain deductions in arriving at the net estate, so as to add a new section allowing a deduction for:

> "The net shrinkage in value of assets arising solely from the difference in the aggregate value of assets forming a part of the decedent's gross estate on the date of death and the aggregate value of such assets one year after the decedent's death * * *."

The deduction to be allowed was the difference between the value of the *assets* of the estate on the date of death and the value of *such assets* on the optional valuation date, signifying that the same assets should be valued on both dates and with no indication that any income accruing between those dates should be included in the valuation.

The purpose of the amendment was stated in the report of the Senate Finance Committee on the Revenue Bill of 1935 (74th Congress, First Session, S. R. No. 1240, pp. 9-10), as follows:

> "This provision is equitable in its effects and will prevent in practically all cases the danger of complete confiscation of estates due to a sudden decline in market values."

Section 202 was changed in conference to read as it was finally enacted, but its purpose remained unchanged. An explanation of that section and its operation is set forth in the report of the committee of conference on the Revenue Bill of 1935 (74th Congress, First Session, H. R. No. 1885, pp. 10-11).

The following illustration therein set forth is pertinent:

> "The operation of this new provision giving the executor an election may be shown by the following example:
>
> A decedent dies owning real estate of the value of $100,000, corporate stock of the value of $60,000, bonds of the value of $20,000, foreign government bonds maturing 9 months after date of death of a face value of $10,000, but of a value of $9,550, and cash amounting to $5,000. These values are as of the date of death. The gross estate at date of death amounted, therefore, to $194,550. The decedent had debts of $15,000 and the administration expenses were $25,000, which debts and expenses were promptly paid by the executor. The value of the net estate as of date of death was, therefore (after taking off the specific exemption), $114,550. Six months after the decedent's death the executor distributed the bonds to a legatee under the will, at which time they were worth $18,000, and he sold all the corporate stock owned by the decedent for a fair market value of $50,000 in order to raise cash to pay the debts and expenses. The foreign bonds were paid in full at maturity.[3] During the first year after the decedent's death the value of his real estate appreciated $5,000. The executor elects to take advantage of the new provisions of the bill. The value will be arrived at in this way:

---

[3] The fact that these bonds were "paid in full" at maturity nine months after death shows that interest must have accrued *and been paid* on them after death. It is reasonable to suppose that the other assets also produced income after death.

Assets		Value
Real estate (as of 1 year after death)		$105,000
Corporate stock (as of date of sale)		50,000
Bonds (as of date of distribution)		18,000
Foreign bonds (as of date of disposition, *i. e.*, maturity)		10,000
Cash		5,000
Gross estate		$188,000
Deduct:		
Debts	$15,000	
Administration expenses	25,000	
Specific exemption	40,000	80,000
Net estate		$108,000"

The fact that the illustration does not show the inclusion of income accruing between the date of death and the optional valuation date (the only cash included is the $5,000 which the decedent had at the date of death) is a definite indication that Congress intended that such income should not be included.

VII.

The Treasury's contention, that its "interpretation" of the statute is necessary to prevent tax evasion, is unfounded.

The Treasury insists that the law must be interpreted to include in the estate the income after death, in order to prevent tax evasion. Several far-fetched, unlikely situations are referred to.

It is said that the executor may sell all the coupons from the estate's bonds, so that one year after death

the bonds will have lost a great part of their value, and that an unfair advantage would be obtained by the estate if the proceeds were not added to the estate in arriving at the value one year after death. The answer is obvious. Selling off coupons in advance of their maturity would materially alter the bonds; the mutilated bonds left in the estate would not be the same assets as the bonds owned at the date of death with all unmatured coupons attached. For example, they would not be good delivery against a contract to sell the original bonds. It seems clear that the original bonds would have to be valued at the date of such mutilation.

But clipping coupons and collecting the interest thereon *in regular course as they mature* does not alter the character of a bond; it remains what it always was, a bond with all unmatured coupons attached.

The answer is the same to the assertion that an estate could evade tax by commuting and collecting rent or royalties in advance.

The Treasury points also to large, extraordinary dividends paid within one year after death out of corporate surplus existing at the date of death as a possible means of tax dodging under the statute as written, especially where the decedent's estate owns a controlling interest in the corporation.

It cannot be denied that such extraordinary dividends might deplete and reduce the value of the stock owned at the date of death. To the extent that they do, we see no reason why such dividends should not be treated as effecting a partial disposition of the stock held at the date of death, thus requiring that

the full value of the stock before the payment of such dividends be included in the estate.[4]

However, it is not necessary to consider the question of such extraordinary dividends in these cases or in the companion case of *Maass* v. *Higgins*, in none of which are any such dividends involved.

It is sufficient here to point out that there is no basis, in logic or common fairness, for treating *ordinary dividends* paid in regular course of business (or *ordinary bond interest*) as constituting, at one and the same time, both capital owned at death and income earned after death, and thus subjecting them to the burden of double taxation.

Conclusion.

The Treasury's attempt to treat ordinary dividends and bond interest earned after death as constituting both income and a return of capital to the estate shocks common understanding, is unsound in theory, violates the fundamental distinction between capital and income, seeks to overthrow cardinal principles long established in the field of taxation, and ignores the plain language of the statute; all for the purpose of curing a supposed but really non-existent defect

---

[4] In estate and trust accounting, extraordinary dividends are treated as principal to the extent they are paid out of earnings accumulated before death or before the creation of the trust, as the case may be. See *Matter of Osborne*, 209 N. Y. 450.

True stock dividends (a mere subdivision of shares) and liquidating and other distributions out of corporate capital present no problem. Such distributions are not income, but are treated as a partial return of capital under the tax law (Int. Rev. Code, Sec. 115(c), (d), (f)) and for all purposes.

in the law as enacted, by a method which would impose an unjust burden of double taxation which there is no reason to believe Congress would approve.

The decisions below are wrong and should be reversed.

Respectfully submitted,

ROLLIN BROWNE,
Attorney for Petitioners.

JAMES D. OUCHTERLONEY,
GEORGE CRAVEN,
MITCHELL, TAYLOR, CAPRON & MARSH,
Of Counsel.

Appendix.

The Regulation.

Article 11, Regulations 80 (in part):

ART. 11. **Optional valuation date.**—In general, the object of subdivision (j) of section 302 is to make provision whereby the amount of tax otherwise payable may be lessened when, within the year following the decedent's death, the gross estate has suffered a shrinkage in its aggregate value.

If the decedent died after August 30, 1935, the executor may, by an election upon his return, Form 706, if filed within the time prescribed by law or prescribed by the Commissioner in pursuance of law, have the property which was included in the gross estate on the date of the decedent's death valued as of the applicable dates, as follows:

(1) Any property distributed, sold, exchanged, or otherwise disposed of within one year after the decedent's death, valued as of the date of such distribution, sale, exchange, or other disposition, whichever first occurs;

(2) Any property not distributed, sold, exchanged, or otherwise disposed of within such 1-year period, valued as of the date one year after the date of the decedent's death;

(3) Any property, interest, or estate which is affected by mere lapse of time, valued as of the date of decedent's death; except that an adjustment is to be made for any difference in its value, not due to such lapse of time, as of the date one year after the date of decedent's death, or as of the date of its distribution, sale, exchange, or other disposition, whichever date first occurs.

* * *

The property to be valued as of one year after the date of decedent's death, or as of date of decedent's

death, or as of some intermediate date, is the property included in the gross estate on the date of the decedent's death. As property and its value are separate and distinct, the former denoting legal rights, the latter the monetary measure of such rights, and as subdivision (j) treats of the two separately, it will be necessary in every case first to determine what property constituted the gross estate at decedent's death. Subdivisions of section 302, as amended, other than subdivision (j), supply the information necessary to that determination, subdivision (j) being, in the main, confined to the date or dates as at which the value is to be ascertained.

Interest-bearing obligations, such as bonds and notes, embody two promises, one to pay principal and the other to pay interest, and both promises are a part of the gross estate at the death of the decedent, if the obligation was then owned by him, or had been previously so transferred by him, or at his death there was vested in him any such right or power in or with respect to the obligation as to bring it within any of the other subdivisions of section 302, as amended. If the valuation date is that of decedent's death, the principal of the obligation and interest then accrued and unpaid thereon are to be valued as of that date. If the valuation date is subsequent to death, the principal and interest then accrued and unpaid are to be valued as of that date. The valuation date of any part payment of principal or of any installment of interest, made between decedent's death and the date as at which the obligation is to be valued, will be the date of such payment. Like rules will govern, so far as applicable, when any other obligation is involved, as, for example, one calling for the payment of rent or a royalty. Thus, in the case of rent, if the realty and the obligation to pay the rent reserved were parts of the gross estate at the time

of decedent's death, the value of the former must be determined as of the applicable valuation date, and also the value of the rent then accrued and unpaid reserved by the latter. The valuation date of any rent paid in the interim pursuant to the rental obligation will be the date of its payment.

As in the case of bonds and notes, the interest accrued and unpaid upon a judgment on the date as of which the judgment is to be valued is to be included in the valuation. The valuation date of any part payment of the judgment, or of any interest thereon (without regard to whether earned before or after decedent's death), made between decedent's death and the date as of which the judgment is to be valued, will be the date of such payment.

When corporate stock is a part of the gross estate at decedent's death, and a dividend in partial liquidation is thereafter paid on or before the date as of which the stock is to be valued, the valuation date of such dividend will be the date of its payment. Similarly, a dividend paid within the same period out of earnings, whether the earnings are made or accumulated prior or subsequent to decedent's death, will be valued as of the date of its payment. Earnings of the corporation neither declared as a dividend nor paid between decedent's death and the valuation date of the stock, will be reflected in the value of the stock. But a dividend declared prior to the valuation date of the stock and payable subsequent thereto will not be so reflected if the stock is selling "ex dividend" on such valuation date, but is to be valued as of that date.

Differing from payments of principal and interest in the case of bonds and notes, those made upon a judgment are not pursuant to a promise but to an obligation imposed by law, which obligation, in its totality, is a part of the gross estate at decedent's

death if coming within any of the other subdivisions of section 302, as amended. So, too, liquidating dividends and dividends paid from earnings are not pursuant to a promise but are referable to legal rights inherent in stock ownership.

By way of illustrating the operation of subdivision (j), there is given the following example in which the death of the decedent will be taken to have occurred December 1, 1935:

Description	Valuation date	Value at valuation date	Value at date of death
Improved real estate—not disposed of within year following decedent's death	Dec. 1, 1936	$30,000	$35,000
Rents accrued but unpaid under lease antedating decedent's death	Dec. 1, 1936	900	500
Rent paid Jan. 1, 1936	Jan. 1, 1936	600	.....
Bonds sold June 1, 1936	June 1, 1936	59,400	60,000
Interest accrued and unpaid thereon	June 1, 1936	400	400
Interest paid Apr. 1, 1936	Apr. 1, 1936	1,200	.....
Corporate stock—distributed to legatee Nov. 1, 1936	Nov. 1, 1936	100,000	200,000
Cash dividend paid upon such stock Aug. 1, 1936	Aug. 1, 1936	100,000	.....
Bonds matured and paid Oct. 1, 1936	Oct. 1, 1936	12,000	12,000
Interest accrued	.....	.....	80
Interest paid at maturity	Oct. 1, 1936	240	.....
Interest paid Apr. 1, 1936	Apr. 1, 1936	240	.....
Corporate stock—not disposed of within year following decedent's death, and upon which no dividend was paid in that period	Dec. 1, 1936	50,000	100,000
Total value of gross estate pursuant to the election	.....	354,980	.....
Total value of gross estate as of date of decedent's death	.....	.....	407,980

Properties, interests, or estates which are affected by mere lapse of time include patents, estates for the life of a person other than the decedent, remainders,

reversions, and other like properties, interests, or estates. The phrase "affected by mere lapse of time" has no reference to obligations for the payment of money, whether or not interest-bearing, the value of which changes with the passing of time. However, such an obligation, like any other property, may become affected by lapse of time when made the subject of a bequest or transfer which itself is creative of an interest or estate so affected.

* * * *

Deductions authorized under section 303 are limited to the extent that allowance thereof is not, in effect, given in the valuing of the gross estate. Property passing by decedent's will, or passing by a transfer made by the decedent in his lifetime (if the transfer was such as to require the property transferred to be included in the gross estate) to or for any such public, charitable, or religious uses as are described in section 303(a)(3) or in section 303(b)(3), is deductible at its value as of the date of the decedent's death, subject, however, to adjustment for any difference in value one year after such death, or at the date of the sale or exchange in the case of property sold or exchanged during such 1-year period. But no such adjustment may take into account any difference in value due to lapse of time or to the occurrence or non-occurrence of a contingency.

The election is available to the executor only at the time the return is filed, and only if the return is filed within 15 months from the decedent's death, or within the period of an extension of time for filing granted under the provisions of article 68 or 69 of these regulations. The election applies to all the property included in the gross estate on the date of the decedent's death. It can not be applied only to a portion of such property. The election, if exercised, can not be rescinded.

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Supreme Court, U.S.
FILED
OCT 30 1945
CHARLES ELMORE CROPLEY

Nos. 510-511

In the Supreme Court of the United States

October Term, 1945

ESTATE OF CORDELIA Y. ABERNETHY, CITY BANK FARMERS TRUST COMPANY, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF CORDELIA Y. ABERNETHY, DECEASED, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ESTATE OF KATE READ BLACKER, CITY BANK FARMERS TRUST COMPANY, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF KATE READ BLACKER, DECEASED, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

In the Supreme Court of the United States

OCTOBER TERM, 1940

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ESTATE OF CORDELIA Y. ABENDROTH, CITY BANK FARMERS TRUST COMPANY, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF CORDELIA Y. ABENDROTH, DECEASED, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

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v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

MEMORANDUM FOR THE RESPONDENT

The petition in these cases presents the same question as is now before this Court in the case of *Maass* v. *Higgins*, No. 274, present term, certiorari granted October 14, 1940. Since the court below

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decided these cases on the authority of its own decision in the *Maass* case (*sub nom. Saks* v. *Higgins,* 111 F. (2d) 78), we do not oppose the petition for certiorari in the instant cases.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

OCTOBER 1940.

U. S. GOVERNMENT PRINTING OFFICE: 1940

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 510

ESTATE OF CORDELIA Y. ABENDROTH, CITY BANK FARMERS TRUST COMPANY, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF CORDELIA Y. ABENDROTH, DECEASED, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

No. 511

ESTATE OF KATE READ BLACQUE, CITY BANK FARMERS TRUST COMPANY, AS EXECUTOR OF THE LAST WILL AND TESTAMENT OF KATE READ BLACQUE, DECEASED, PETITIONER

v.

GUY T. HELVERING, COMMISSIONER OF INTERNAL REVENUE

ON WRITS OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT

OPINIONS BELOW

The majority (R. 86–87) and dissenting (R. 87–89) opinions of the Board of Tax Appeals are

reported at 41 B. T. A. 1178. The *per curiam* opinion of the Circuit Court of Appeals (R. 113) is reported at 114 F. (2d) 1017.

JURISDICTION

The judgments of the Circuit Court of Appeals were entered on October 10, 1940 (R. 114, 116). The petition for writs of certiorari was filed October 16, 1940, and was granted November 18, 1940. The jurisdiction of this Court is conferred by Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Section 302 (j) of the Revenue Act of 1926, as added by Section 202 (a) of the Revenue Act of 1935, gives the executor of an estate an option to have the value of the gross estate determined by valuing the property which is included therein on the date of decedent's death at its value as of the date one year after death; if any of the property is disposed of during the year after death, such property is to be valued at its value on the date of disposition. The question presented is whether rights to interest and dividends owned by a decedent at the date of his death are property of the estate within the meaning of this section.

STATUTE AND REGULATIONS INVOLVED

The pertinent statute and Regulations involved are set forth in the Appendix to the Government's

brief in *Maass* v. *Higgins*, No. 274, present Term, with which the present case is to be argued.

STATEMENT

The facts in these consolidated proceedings, as stipulated (R. 29–33, 48–52) and as found by the Board (R. 87), may be summarized as follows:

Cordelia Y. Abendroth died on October 9, 1936, and Kate Read Blacque died on April 3, 1937 (R. 29, 48). In the federal estate tax return filed on behalf of each estate, the executor of each decedent elected to take advantage of the optional valuation method provided by Section 302 (j) of the Revenue Act of 1926, as added by Section 202 (a) of the Revenue Act of 1935 (R. 30, 49).

During the year following each decedent's death, each estate received in cash certain amounts representing (1) interest accruing after the date of decedent's death on bonds owned by the decedent at the date of death and retained by the estate for one year thereafter; (2) interest accruing after the date of death on bonds owned by the decedent at death and sold or redeemed within one year thereafter, the accrued interest being paid by the purchaser or on redemption; and (3) dividends on stock owned by the decedent at the date of death payable to stockholders of record as of a date subsequent to the date of death. In addition, on the date one year after each decedent's death, there were in each estate (1) interest on bonds of the decedent which had accrued during the year after

the decedent's death but which was not yet payable, and (2) dividends declared on stocks of the decedent to stockholders of record as of a date prior to the date one year after decedent's death, but payable subsequent thereto. All dividends, in the case of each estate, were declared and paid or payable out of current earnings or out of earnings accumulated prior to the date of death and all were ordinary rather than extraordinary or liquidating dividends (R. 32–33, 51–52). The record does not show what part of the dividends represented current earnings and what part represented accumulated earnings.

The Commissioner of Internal Revenue added to the gross estate of each decedent the total of the five items above mentioned, aggregating $3,783.91 in the case of the Abendroth estate and $53,864.45 in the case of the Blacque estate, these amounts not having been included in the returns filed by the executors (R. 32–33, 51–52). Deficiencies were determined accordingly, amounting to $432.83 for the Abendroth estate (R. 10–12) and $13,996.28 for the Blacque estate (R. 20–24). The Board sustained the action of the Commissioner (R. 89, 90) and the court below affirmed (R. 113, 114, 116).

ARGUMENT

These cases involve the same question as that presented in *Maass* v. *Higgins,* No. 274, present Term, with which they are to be argued, and they

were decided by the court below on the authority of its own earlier decision in the *Maass* case (then known as *Saks* v. *Higgins,* 111 F. (2d) 78). Reference is accordingly made to the Government's brief in the *Maass* case for the arguments in support of the Government's position here.

CONCLUSION

The decisions below should be affirmed.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.
SAMUEL O. CLARK, Jr.,
Assistant Attorney General.
SEWELL KEY,
RICHARD H. DEMUTH,
HARRY MARSELLI,
Special Assistants to the Attorney General.
ANDERSON PAGE, *Attorney.*

JANUARY 1941.

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SUPREME COURT OF THE UNITED STATES.

Nos. 274, 510, 511.—October Term, 1940.

Herbert H. Maass, as sole surviving Executor of the last Will and Testament of Ida H. Saks, Deceased, Petitioner,
274 *vs.*
Joseph T. Higgins, Collector of Internal Revenue for the Third District of New York.

Estate of Cordelia Y. Abendroth City Bank Farmers Trust Company, as Executor of the last Will and Testament of Cordelia Y. Abendroth, Deceased, Petitioner,
510 *vs.*
Commissioner of Internal Revenue.

Estate of Kate Read Blacque, City Bank Farmers Trust Company, as Executor of the last Will and Testament of Kate Read Blacque, Deceased, Petitioner,
511 *vs.*
Commissioner of Internal Revenue.

On Petitions for Writs of Certiorari to the United States Circuit Court of Appeals for the Second Circuit.

[March 3, 1941.]

Mr. Justice Roberts delivered the opinion of the Court.

In these cases we must decide whether, where an executor avails himself of the option extended by the estate tax law to value a decedent's gross estate as of one year after the decedent's death, rents, dividends, and interest received during the year are to be added to the value of the property to which they are attributable and included in the value of the gross estate. The question arises under § 302(j) of the Revenue Act of 1926 as added by § 202(a) of the Revenue Act of 1935.[1]

and accrued

[1] The subsection has now been embodied in the Internal Revenue Code as § 811(j), 53 Stat. 122, 26 U. S. C. A. 811(j) and is in part as follows:
"*Optional valuation.* If the executor so elects upon his return . . . , the value of the gross estate shall be determined by valuing all the property included therein on the date of the decedent's death as of the date one year

No. 274 is a suit against the Collector to recover an overpayment of tax. The complaint alleged that the decedent died August 30, 1936; that in the estate's return the executors elected to have the value of the gross estate determined by valuing it as of one year after the decedent's death; that the Commissioner included in the estate a sum which was not in fact the decedent's property at the time of her death but represented income, namely, rents, dividends, and interest earned by the estate subsequent to the decedent's death; that the executors paid the tax and their claim for refund was rejected. The Collector's answer raised no material issue of fact. Each party moved for judgment on the pleadings. The court dismissed the complaint.[2] The Circuit Court of Appeals affirmed, one judge dissenting.[3]

In Nos. 510 and 511, the executor of two decedents who died respectively October 9, 1936, and April 3, 1937, elected in its returns to have the gross estates valued as of one year after death or as of date of disposition. In each case the executor collected interest and dividends upon bonds and stocks forming part of the estate at decedent's death. The sums so collected were not reckoned in fixing the values of the estates, except such portion of them as accrued prior to death. The Commissioner determined deficiencies due to the failure to return them. The Board of Tax Appeals affirmed his action[4] and the Circuit Court of Appeals affirmed the Board's decision.[5]

Although there was no conflict between decisions of Circuit Courts of Appeals,[6] we granted certiorari because of the importance of the question and the number of pending cases in which it is presented.

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after the decedent's death, except that (1) property included in the gross estate on the date of death and, within one year after the decedent's death, distributed . . . . or sold, exchanged, or otherwise disposed of, shall be included at its value as of the time of such distribution, sale, exchange, or other disposition, whichever first occurs, instead of its value as of the date one year after the decedent's death, and (2) any interest or estate which is affected by mere lapse of time shall be included at its value as of the time of death (instead of the later date) with adjustment for any difference in its value as of the later date not due to mere lapse of time. . . . ."

[2] 29 F. Supp. 996.

[3] 111 F. (2d) 78.

[4] 41 B. T. A. 1178, four members dissenting.

[5] 114 F. (2d) 1017.

[6] The District Court for Maryland has decided contrary to the Circuit Court of Appeals for the Second Circuit: Clark *v.* United States, 33 F. Supp. 216.

It is agreed that the purpose of subdivision (j) was to mitigate the hardship consequent upon shrinkage in the value of estates during the year following death. Congress enacted it in the light of the fact that, due to such shrinkages, many estates were almost obliterated by the necessity of paying a tax on the value of the assets at the date of decedent's death. About one year after the adoption of the subsection, the Treasury promulgated Art. 11 of Regulations 80 (1937 Ed.) in which it ruled that interest bearing obligations, such as bonds, embodied two promises, one to pay principal, the other to pay interest, both a part of the gross estate if the obligation was owned by the decedent at his death. It further ruled that in the case of leased real estate two factors were to be considered, the value of the realty and the value of the covenant to pay rent. With respect to stocks, it ruled that the value of the stock and the value of the right to dividends thereon were separable and each constituted an element of value to the decedent. The regulation required that if, during the year subsequent to death, rents, royalties, interest, or dividends were received by the decedent's estate, such portion thereof as had not accrued, or was not attributable to a period, prior to death, should be returned in full and reckoned as part of the gross estate in any case where the executor elected, as permitted by subsection (j), to value the assets as of one year after the decedent's death or as of the date of disposition of any asset. In accordance with the regulation the deficiencies in the present cases were determined.

In the courts below, and before the Board of Tax Appeals, the Government contended that such items of income are in truth payments on account of principal and that, by such payments, the principal is reduced so that, when the capital asset is valued at the end of the period, its true value is not reflected unless there be added the interest, dividend, or other like payment received by the estate in the interim. In this court, the argument takes a somewhat different form. Reference is made to the fact that, under the option granted, a capital asset is to be valued either at the expiration of the year or at the time of disposition and it is urged that, as respects interest, rent or dividends, a disposition occurs at the date of the receipt of the item. In either aspect the validity of the contention depends upon the theory that, for purposes of estate tax valuation, the asset consists of two elements,—one the right of ownership the other the right to receive the income. It is said that

both of these elements enter into the valuation made as of the date of death and if, in the subsequent period, the latter emerges in the shape of a payment that payment is to be attributable to the income right rather than to the right of ownership of the income producing property.

On the other hand, the petitioners insist that the Government's position is unreal and artificial; that it does not comport either with economic theory or business practice; and that the regulation is an unwarranted extension of the plain meaning of the statute and cannot, therefore, be sustained. We hold that the petitioners are right.

It is not denied that, in common understanding, rents, interest, and dividends are income. Under the revenue acts, if such items are collected by a decedent's estate, the executors are bound to return them and pay tax upon them as income. In the case of a living holder, such receipts are never treated as on account of principal. Nor does the promise to pay interest, rents or dividends either to a living owner of the asset or to his executor after death, which has not been legally separated from the asset of which it is an incident, have any market value apart from the asset, or bear any invariable relation to the value of the capital asset.

It is true that a bond embodies two promises, one to pay the principal at maturity, the other to pay interest at intervals until maturity. And the promise to pay interest or rent, or the expectancy of dividends upon stock, the amount of such payments, the past and prospective regularity of the payments, and other elements bearing upon the expectation of the receipt of income affect the value of any income producing property. But these elements are not separately valued in appraising the worth of the asset at any given time. It is the uniform practice to value the asset as an entirety, taking into consideration all the elements that go to give it value in the market.

In the appraisal of a decedent's estate, rent or interest accrued to the date of death is properly treated as a capital asset. So also, on the sale of an interest bearing security, it is the uniform practice to add to the value of the obligation, as such, accrued interest to the date of sale. Since the statute says that, at the option of the executor, a bond may be valued as of one year subsequent to the decedent's death, the natural conclusion is that the usual method

f valuation shall be pursued whichever date is selected. The ıethod always adopted for valuation at death is the same used in ıxing a sale price; that is, to take the market value of the bond ıd add accrued interest to the date of transfer, at the rate stipuıted in the instrument. It is not believed that Congress, in proiding for two dates of valuation, intended that a different method ıould be followed if one date were chosen rather than the other. If Congress intended the result for which the Government conıds, namely, that a different method of valuation should apply the end of the one year period than that applicable as of the ıte of death, it would have been a simple matter so to state. That ongress had no such intention seems clear from the report of the ouse Managers on the conference committee report on the bill hich embodied the language in question.[7] There an example is ven as to how the calculation of value should be made at the end the year. In this example appreciation and depreciation in the lue of bonds, stocks, and other assets, during the year, are shown t dividends or interest received are not included.

As has been said, the view we take comports with standard busiss practice; whereas the theory advocated by the Government volves the attribution to interest payments of a quality derived om a refined separation of so-called rights inherent in the ownerip of income producing property. Conceding that the ownership a bond involves both the right to receive principal and the right receive income, it is a highly artificial concept that an interest yment is a disposition, *pro tanto*, of the latter right by the owner the obligation. Moreover, while the Constitution does not forbid uble taxation, the intent to impose it upon a given receipt is not esumed. We think that, if it had been intended, Congress unıivocally would have so declared.

Judgments reversed.

Mr. Justice BLACK and Mr. Justice DOUGLAS are of the view that s question of statutory construction is peculiarly appropriate for ministrative interpretation (See Paul, Studies in Federal Taxan (3d series) pp. 423-425) and accordingly that the judgments these cases should be affirmed for the reasons stated in the opinion the court below in No. 274, *Saks* v. *Higgins*, 111 F. (2d) 78.

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[7] H. R. 1885, 74th Cong., 1st Sess., pp. 10-11.